

CLERK'S COPY.

**TRANSCRIPT OF RECORD**

---

**Supreme Court of the United States**

**OCTOBER TERM, 1940**

**No. 48**

---

**STATE OF WISCONSIN AND ~~ELMER E.~~ BARLOW,  
AS COMMISSIONER OF TAXATION OF THE  
STATE OF WISCONSIN, PETITIONERS,**

*vs.*

**MINNESOTA MINING AND MANUFACTURING  
COMPANY**

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF WISCONSIN**

---

**PETITION FOR CERTIORARI FILED APRIL 10, 1940.**

**CERTIORARI GRANTED MAY 20, 1940.**

***BLANK PAGE***

# INDEX.

	Record Page.	Case Page.
Nature of Action .....	...	1
Admissions of Service of Notice of Appeal to Circuit Court of Dane County by Attorney General ....	124-125	83
Admission of Service of Appellant's Brief by Attorney General on February 16, 1939 .....	128	83
Admission of Service on Notice of Appeal by Attorney General and Clerk of Circuit Court on June 13, 1939 .....	288	88
Answer of Tax Commission, on Ap- peal to Circuit Court .....	126-127	38-39
Appellant's Brief on Appeal to Cir- cuit Court of Dane County .....	129-206	83
Copy of Judgment Attached to No- tice of Appeal .....	284-285	88
Decision of Circuit Court .....	275-276	83
Decision of Tax Commission .....	44-53	74-82
<i>Exhibit 1</i> —Stipulation of Facts be- fore Tax Commission .....	60-63	42-45
<i>Exhibit 2</i> —Return Receipt of Regis- tered Letter and Letter of Wis- consin Tax Commission to Minne- sota Mining and Manufacturing Company, dated August 13, 1937, Assessing Privilege Dividend Tax .....	65-66	46-47

# Index—Continued.

	Record Page.	Case Page.
<i>Exhibit 3</i> —Audit of Privilege Divi- dend Tax Enclosed in Letter of August 13, 1937 (folded insert)...	68-74	at p. 48
<i>Exhibit 4</i> —Letter of Minnesota Min- ing and Manufacturing Company to Wisconsin Tax Commission, Protesting Privilege Dividend Tax and Demand for Hearing ..	75-76	48
<i>Exhibit 5</i> —Letter of Wisconsin Tax Commission to Minnesota Mining and Manufacturing Company, Acknowledging Receipt of Pro- test and Demand for Hearing ..	77-78	48
<i>Exhibit 6</i> —Letter of Transmittal and Amended Protest .....	80-91	48-62
<i>Exhibit 7</i> —Asset and Liability State- ment .....	93	62
Index of Transcript of Testimony be- fore Tax Commission .....	3	39
Judgment .....	280-281	85-86
Letter of Transmittal of Tax Com- mission's Decision to Minnesota Mining and Manufacturing Com- pany, dated January 4, 1939 ....	56	83
Memorandum Decision and Order Confirming Assessment of Wis- consin Tax Commission .....	275-276	83-85



# **Index—Continued**

	<b>Record Page.</b>	<b>Case Page.</b>
Notice of Appeal to Circuit Court ..	95-124	2-38.
Notice of Appeal to Supreme Court.	283	87
Power of Attorney to Agent to Exe- cute Bond .....	287	88
Proceedings before Tax Commission	7-43	39-42
Recomputation of Tax Enclosed in Letter of January 4, 1939 .....	57-58	83
Return of Tax Commission on Ap- peal to Clerk of Circuit Court, Dane County .....	2	39
Return of Clerk of Circuit Court of Dane County to Supreme Court of Wisconsin on Appeal .....	289	88
Return Receipt of Registered Mail, Sending Tax Commission's De- cision .....	55	83
Respondent's Brief on Appeal to Circuit Court of Dane County ..	208-271	83
Stipulation Consenting to Immediate Hearing on Appeal before Circuit Court of Dane County .....	273-274	83
Undertaking on Appeal .....	286	88
Waiver of Notice of Application for Entry of Judgment .....	278	85

# **APPELLANT'S WITNESS**

	<b>Record Page.</b>	<b>Case Page.</b>	
<b>BUETOW, HERBERT B.—</b>			
Direct Examination .....	12-39	63-73	
Cross Examination .....	39-41	73-74	
Proceedings in Supreme Court of Wisconsin .....			Print 89
Caption .....			89
Notice of appeal from Circuit Court .....			89
Judgment of Circuit Court .....			90
Undertaking on appeal .....			91
Stipulation re parties defendant .....			93
Minute entry of hearing .....			94
Judgment .....			94
Opinion, Rosenberry, J. ....			95
Clerk's certificate .....			95
Order allowing certiorari .....			96

**STATE OF WISCONSIN  
IN SUPREME COURT**

**AUGUST TERM, 1939.**

No. 98

---

---

**MINNESOTA MINING AND MANUFACTURING COMPANY,**

**Appellant,**

**vs.**

**WISCONSIN TAX COMMISSION,**

**Respondent.**

---

---

**CASE**

---

---

Page of  
Record.

This is an appeal from an order or judgment of the Circuit Court for Dane County, Wisconsin, Honorable August C. Hoppmann presiding, entered on the 10th day of June, 1939, confirming the order of the Wisconsin Tax Commission dated December 19, 1938, and the privilege dividend tax imposed upon dividends declared by the Minnesota Mining and Manufacturing Company on January 2, 1936, April 1, 1936, July 1, 1936, October 1, 1936 and December 22, 1936.

Page of  
Record.

1-95 Record Before Tax Commission and Return to Circuit Court on Appeal (Included in subsequent portion of printed case).

95-124 NOTICE OF APPEAL TO CIRCUIT COURT.

(Omitting signatures.)

95 To the Wisconsin Tax Commission, Madison, Wisconsin.

**PLEASE TAKE NOTICE** that the Minnesota Mining and Manufacturing Company hereby appeals to the Circuit Court for Dane County, Wisconsin, from the whole of the decision of the Wisconsin Tax Commission which was served by registered mail upon the appellant on January 4, 1939, and which bears date of the 19th day of December, 1938, a copy of which said decision is hereto attached, marked "Exhibit I" and is hereby referred to and made a part of this notice.

OBJECTIONS TO ORDER AND DECISION AND TO ASSESSMENT.

The objections to said order and decision and to the assessment made are stated as follows:

(1) The assessment and decision are void and of no effect whatsoever by reason of the fact that the purported law on which said assessment and purported tax is based is unconstitutional both under the Constitution of the United States of America and the Constitution of the State of



Wisconsin, and particularly under the Fourteenth Amendment of the Constitution of the United States of America; Article I, Section 1, Constitution of the State of Wisconsin; Article I, Section 8, Constitution of the United States of America; Article I, Section 10, Constitution of the United States of America; Article I, Section 8, Constitution of the State of Wisconsin; Article I, Section 12, Constitution of the State of Wisconsin; Article IV, Section 1, Constitution of the United States of America.

(2) That said assessment, insofar as it includes any so-called dividends on treasury stock of the Minnesota Mining and Manufacturing Company as a part of the base on which the alleged dividend tax is computed, is void and of no effect whatsoever by reason of the fact that the law did not contemplate that dividends on treasury stock should be included in such base.

(3) That said assessment, insofar as it includes earnings upon federal instrumentalities and the interest derived thereon of the Minnesota Mining and Manufacturing Company as a part of the base upon which the alleged privilege dividend tax is computed, is void and of no effect whatsoever under Article I, Section 8 of the Constitution of the United States of America.

(4) That said assessment, insofar as it includes the investment income of the Minnesota

Page of  
Record.

Mining and Manufacturing Company, having no taxable situs in Wisconsin, as a part of the base upon which the alleged privilege dividend tax is computed, is void and unconstitutional under the Fourteenth Amendment of the Constitution of the United States of America.

97 (5) That said assessment, insofar as it includes royalty income of the Minnesota Mining and Manufacturing Company, having no taxable situs in Wisconsin, as a part of the base upon which the alleged privilege dividend tax is computed, is void and unconstitutional under the Fourteenth Amendment of the Constitution of the United States of America.

(6) That said assessment is void and of no effect whatsoever in that the Minnesota Mining and Manufacturing Company, when it distributed the \$1,679,952.55 in the year 1936, was not distributing the \$218,842.45 earned by it in the State of Wisconsin.

**STATEMENT OF FACTS UPON WHICH  
APPELLANT RELIES AS CONSTITU-  
TING BASIS OF THIS APPEAL.**

From the record herein made before the Wisconsin Tax Commission it appears that the Minnesota Mining and Manufacturing Company is a Delaware corporation, engaged in the business of manufacturing in the States of Minnesota, Michigan, Ohio and Wisconsin, and sells its products so manufactured in every state in the Union and

in foreign countries. The statutory principal office of the company is Wilmington, Delaware. All stockholders' meetings are held in St. Paul Minnesota. The principal business office at which all meetings of the directors are held is in St. Paul, Minnesota. The said Minnesota Mining and Manufacturing Company is qualified to do business in the State of Wisconsin, but has no executive office of any kind located within the State of Wisconsin.

Under the formula used by the Tax Commission the total adjusted net income for the year 1935 was \$2,007,460.30. The correct adjusted net income for the year 1935 should be \$2,155,116.96, for under the decision the position of the Minnesota Mining and Manufacturing Company in reference to Braeder-Adamson Paper Mills, Inc., loss was well taken.

98 The amount of net income allocable to Wisconsin under the formula used by the Wisconsin Tax Commission for the year 1935 was \$261,157.62. The percentage of the total net income allocable to Wisconsin on the basis of the formula so used by the Wisconsin Tax Commission was 13.0093% for the year 1935. The percentage should have been found to be 12.1180% for the year 1935. Using the formula of the Wisconsin Tax Commission it resulted in a tax of \$5,471.06 and interest to March 1, 1939, amounting to \$894.52.

On January 2, 1936, the Minnesota Mining and Manufacturing Company declared a dividend on all of its outstanding shares of stock and paid a

Page of  
Record.

total of \$215,909.83 in dividends, exclusive of the so-called dividends on shares held in the treasury, and made payment of \$371.25 upon said treasury stock on that date. On April 1, 1936, the Minnesota Mining and Manufacturing Company paid a dividend on all outstanding shares of stock amounting to \$216,380.97. On July 1, 1936, the Minnesota Mining and Manufacturing Company paid a dividend on all outstanding shares of stock amounting to \$288,278.00. On October 1, 1936, the Minnesota Mining and Manufacturing Company paid a dividend on all outstanding shares of stock amounting to \$336,441.00. On December 12, 1936, the Minnesota Mining and Manufacturing Company paid a dividend on all outstanding shares of stock amounting to \$624,819.00.

The Minnesota Mining and Manufacturing Company, believing said privilege dividend tax to be void, did not make a return of the dividends paid prior to January 1, 1937, and on August 13, 1937, the Wisconsin Tax Commission duly notified the Minnesota Mining and Manufacturing Company that it owed a privilege dividend tax of \$6,382.75 with interest amounting to \$501.01 computed to September 30, 1937. This assessment was made pursuant to Chapter 505 of the Wisconsin Session Laws for 1935, effective September 26, 1935, as amended by Chapter 552 of the Wisconsin Session Laws for 1935, effective October 9, 1935, and the percentage of the 1935 income allocable to Wisconsin was 14.8010%.

99

That the Minnesota Mining and Manufacturing Company duly filed its original application and



amended application for hearing on said assessment within the period prescribed by law. Hearing was had on the application and amended application for hearing, resulting in entry by the Wisconsin Tax Commission of the decision from which this appeal is taken.

There follows a recitation of certain of the details with respect to the Minnesota Mining and Manufacturing Company's manner of conducting its operations and disbursing its funds. On each of the dates fixed as the record date for determination of the stockholders entitled to receive each of the dividends upon which a privilege dividend tax has been assessed against the company there have been in excess of 1961 stockholders residing in practically every state in the Union, owning an aggregate of 961,260 shares of common stock. On each of said dates the number of stockholders residing in the state of Wisconsin has been not greater than 42 and the number of shares held by such stockholders have been not greater than 3,006. That the Minnesota Mining and Manufacturing Company has no preferred stock outstanding.

All meetings of the board of directors of the company at which dividends were declared were held in the State of Minnesota, and all acts of the company or its agents in connection with the declaration and payments of dividends was performed within and pursuant to the laws of the States of Minnesota and Delaware, and the funds out of which said dividends were paid were kept

Page of  
Record:

in the State of Minnesota. No act or transaction connected with the declaration and payment of said dividends was done or performed within the state of Wisconsin, with the sole exception that certain dividends so declared and paid amounting in the case of each of the dividends to which this appeal relates to less than one-third of 1% of all 100 dividends declared and paid, were received by stockholders of the Minnesota Mining and Manufacturing Company residing in the State of Wisconsin.

All of the gross income of the Minnesota Mining and Manufacturing Company's factory in Wisconsin during the time involved in this appeal was handled as follows: That the factory at Wausau, Wisconsin, shipped all of its products to points South, East and West. That sales of said products are made by the Chicago office of the Minnesota Mining and Manufacturing Company, and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the Minnesota Mining and Manufacturing Company and deposited by it in banks in St. Paul, Minnesota. That all books and records covering the Wisconsin factory of the Minnesota Mining and Manufacturing Company are kept in St. Paul, Minnesota. That all wages of the Minnesota Mining and Manufacturing Company employees of Wisconsin are paid directly from St. Paul, Minnesota. That the receipts from the Wausau factory of the Minnesota Mining and Manufacturing Company are co-mingled with the earnings

from the Minnesota Mining and Manufacturing Company's factories at St. Paul, Minnesota, Detroit, Michigan, and Copley, Ohio, and with earnings from companies in which the Minnesota Mining and Manufacturing Company owns a substantial amount of stock, earnings from doing business in foreign countries, earnings from royalties, dividends and from stocks owned by the Minnesota Mining and Manufacturing Company, and interest from federal and other bonds owned by the Minnesota Mining and Manufacturing Company, and after payment of salaries, overhead and taxes, dividends are declared and paid from this fund. That all stock records are kept and dividends are paid by the First Trust Company of St. Paul, which acts as transfer agent and paying agent of the Minnesota Mining and Manufacturing Company. Dividends are not paid out of income received from any particular source or earned in any ascertainable period, but are paid

101 out of the general fund of the Minnesota Mining and Manufacturing Company. Regardless of when earned or from where earned, the dividend payment is made by drawing a check or checks for the amount to the order of the First Trust Company of St. Paul, which itself makes actual payment to the stockholders by mailing the same in the regular course of mail from St. Paul, Minnesota, to the respective addresses of the stockholders, at the dates fixed by the board of directors. That the Minnesota Mining and Manufacturing Company at no time deducted any of the

Page of  
Record.

alleged taxes from the dividends paid to its stockholders.

The application for hearing and the proofs before the Tax Commission at the hearing showed in tabulated form the amounts received by Wisconsin residents upon the payment of the dividends in question, the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (based on the computation used by the Tax Commission in reaching assessments), and the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings (on basis of figures originally used by the Tax Commission).

Dividend Date	(1)	(2)	(3)
1/2/36	\$215,909.83 x .3127	\$ 675.15 x 2.5%	\$ 16.88
4/1/36	216,380.97 x "	676.62 x "	16.92
7/1/36	288,278.00 x "	901.45 x "	22.54
10/1/36	336,441.00 x "	1,052.05 x "	26.30
12/22/36	624,819.00 x "	1,953.81 x "	48.85
		Total	\$131.49

- (1) represents the total amounts received by the Wisconsin residents on the payments of the respective dividends.
- (2) represents the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings based on the percentages finally determined to be used by the decision of the Wisconsin Tax Commission.
- (3) represents the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings.



102, The record before the Commission further contains undisputed proof that compliance with the statute would require the appellant to perform numerous clerical operations in the State of Minnesota each time a dividend is paid, all resulting in additional expense to the Minnesota Mining and Manufacturing Company.

The privilege dividend tax was computed by the Tax Commission on the theory that there were paid \$1,681,828.80 in dividends. The dividends actually paid were \$1,679,962.25. The difference is accounted for by the dividends on Minnesota Mining and Manufacturing Company treasury stock. Thus a tax of \$46.60 was illegally assessed against the Minnesota Mining and Manufacturing Company.

Effect of failure to deduct from dividends interest from federal securities:

Total dividends	\$1,679,962.55
Less federal interest distributed	10,191.37
	<hr/>
	\$1,669,771.18
Percent dividend taxable	12.1180
Taxable dividend	202,342.87
Rate of tax	2.50
Amount of tax	5,058.57

Effect of failure to deduct interest and dividends which intangibles have a taxable situs outside the State of Wisconsin:

Total dividend	\$1,669,771.18
Less interest & dividends distributed	355,394.65
	<hr/>
	\$1,314,376.53

Page of  
Record.

Percent taxable	12.1180
Taxable dividend	\$159,276.15
Rate of tax	2.50
Amount of tax	3,981.90

## 103 Effect of failure to deduct royalties:

Total dividends	\$1,314,376.53
Royalty distribution to stockholders	154,223.33
	<hr/>
	\$1,160,153.20

Percent taxable	12.1180
Taxable dividend	140,587.36
Rate of tax	2.50
Amount of tax	3,514.60

The Minnesota Mining and Manufacturing Company does not maintain a separate system of accounts for its operations at Wausau. The following is a statement of its assets and liabilities in use at Wausau at the end of the years 1934, 1935 and 1936:

**ASSETS**

	Dec. 31, 1934	Dec. 31, 1935	Dec. 31, 1936
Cash	4,830.42	8,645.82	6,769.06
Real Estate	12,364.00	12,664.00	14,148.55
Buildings	189,420.87	361,149.46	370,084.52
Machinery	333,790.69	351,575.96	356,828.82
Colorquartz Machinery	179,259.66	256,736.74	257,004.25
Inventory	93,742.75	194,868.45	266,509.27
	<hr/>	<hr/>	<hr/>
Total Assets	\$813,408.39	\$1,185,640.43	\$1,271,344.47

*LIABILITIES*

Reserve for Depreciation — Buildings	6,437.48	17,448.90	32,073.59
Reserve for Depreciation — Machinery	25,714.09	59,182.01	94,545.03
Reserve for Depreciation — Color-quartz	14,863.36	36,868.60	62,435.29
Net Earnings	7,999.84	266,494.25	449,042.97
Accrued State Income Tax		2,663.21	3,635.80
Net Advances by St. Paul	758,393.62	802,983.46	629,611.79
Total Liabilities	\$813,408.39	\$1,185,640.43	\$1,271,344.47

104 In December, 1939, the taxpayer commenced operations of its Wausau plant. It made no income in Wisconsin that year or any prior years. In 1930 the total net income of the taxpayer from Wisconsin was \$2,396.37, and its income from all sources was \$685,707.54 and paid dividends to its stockholders in the year 1931 of \$548,178.60. In the year 1931 the Wisconsin income of the taxpayer was \$11,527.69; its total income from all sources was \$649,447.09; and it paid dividends in 1932 of \$500,001.66. In the year 1932 the taxpayer sustained a net loss of \$920.76 on its Wisconsin operations; it had a total income from all sources of \$448,588.07; and it paid dividends in 1933 of \$381,074.08. In 1933 the taxpayer had a net income in Wisconsin of \$10,212.72; its total

Page of  
Record.

income from all sources was \$899,829.21; and it paid dividends in 1934 of \$566,671.61. In 1934 the taxpayer sustained a net loss of \$15,216.23 on its Wisconsin operations; it had a net income from all its operations of \$1,203,820.30; and it paid dividends in 1935 of \$690,738.54.

Prior to January 1, 1935, using as a basis the formula of privilege dividend tax law as to distribution of Wisconsin earnings, the taxpayer had distributed to its stockholders in dividends prior to January 1, 1935, all of its Wisconsin earnings. In 1935 its net earnings were \$245,941.39, and a privilege dividend tax was originally imposed upon earnings of \$248,927.48. By this decision the Wisconsin earnings were reduced to \$218,842.45. They should be \$202,342.87.

Another factor to be considered is the method used by the Tax Commission of allocating a part of the total dividends paid to Wisconsin upon the basis of the proportion of the total net income earned in Wisconsin to total income from all sources for the prior year. According to the Tax Commission's figures, the taxpayer had surplus available for dividends in Wisconsin of \$7,999.84 at the end of 1934. Based upon the ratio of the  
105 total earnings in Wisconsin for 1934 to total earnings everywhere, the dividends paid in 1935 would be about \$4,500.00. Using the 14.8010 percentage as applied to the 1936 dividends, the taxpayer would have left out of the 1935 surplus approximately \$10,000. Using the ratio of income in Wisconsin to total income for 1936 and applying this ratio to the dividends paid for 1937, the



Page of  
Record.

taxpayer would have used up all of its surplus at the end of 1936, except some \$40,000. During the year of 1938 it might sustain a loss on its Wisconsin business, but based upon the ratio of 1937 earnings, a certain proportion of the taxpayer's dividends paid in 1938 would be taxable in Wisconsin, which might easily result in an excess amount of dividends being allocated to Wisconsin than the amount of earnings available for distribution from Wisconsin business.

In other words, it cannot be said that earnings for one year in Wisconsin have any relation to the dividend policy of a succeeding year, where a business is as diversified as the taxpayer's.

The record further affirmatively shows that full disclosure has been made to the Wisconsin Tax Commission of all income received by the company and all dividends paid by it, during the period involved on this appeal.

Under date of December 19, 1938, the Wisconsin Tax Commission rendered its decision, a copy of which is attached hereto, marked "Exhibit I", wherein it ordered that the assessment was properly made and that the same should be recomputed on a straight basis of  $2\frac{1}{2}\%$  rather than at a .02564%, the rate originally used by the Tax Commission, and also ordered that it should be recomputed so that the dividends on treasury stock should be subjected to the tax, and also ordered that it should be recomputed so that the loss sustained by the Minnesota Mining and Manufacturing Company in Baeder-Adamson Paper

Page of  
Record.

106 Mills, Inc., not be used as a base, and that the ratio of the Wisconsin income to total income should be figured at 13.0093% instead of 14.8010%. It is from this order and decision that the Minnesota Mining and Manufacturing Company appeals. The recomputation of tax as ordered by the decision is reflected in Exhibit II attached hereto.

### ASSIGNMENTS OF ERROR

(1) The Wisconsin Tax Commission erred in deciding and ordering that the assessment, or any part thereof, was valid and in ordering that the assessment, as recomputed, be placed on the tax rolls.

(2) That the Wisconsin Tax Commission erred in its finding and decision that the Wisconsin privilege dividend tax law was constitutional as applied to any of the dividends paid by the Minnesota Mining and Manufacturing Company as involved in this appeal.

(3) That the Wisconsin Tax Commission erred in any event in determining that the Wisconsin privilege dividend tax was constitutional so far as its application to payment of dividends to such stockholders as are non-residents of Wisconsin.

(4) That the Wisconsin Tax Commission erred in its finding and decision that the assess-

Page of  
Record.

ment should be revised to subject to tax dividends on treasury stock, and in ordering a computation of the tax on any base which includes dividends on treasury stock.

(5) That the Wisconsin Tax Commission erred in refusing to pass on the constitutionality of the Wisconsin privilege dividend tax as applied to the Minnesota Mining and Manufacturing Company.

(6) That the Wisconsin Tax Commission erred in its finding and decision to subject interest from federal securities to the privilege dividend tax and ordering a computation of the tax on any base which includes interest from federal securities.

107 (7) That the Wisconsin Tax Commission erred in its finding and decision to subject interest and dividends from intangibles which have a tax situs outside of the State of Wisconsin to a privilege dividend tax and ordering a computation of the tax on any base which includes such dividends from intangibles which have a tax situs outside of the State of Wisconsin.

(8) That the Wisconsin Tax Commission erred in its finding and decision to subject income from royalties which have a tax situs outside of the State of Wisconsin to the privilege dividend tax and ordering a computation of the tax on any base which includes income from royalties which have a tax situs outside of the State of Wisconsin.

(9) That the Wisconsin Tax Commission erred in deciding that when the Minnesota Mining and Manufacturing Company distributed \$1,679,952.55 in the year 1936, it was distributing \$218,842.45 earned by it in the State of Wisconsin.

PROPOSITIONS OF LAW RELIED  
UPON BY TAXPAYER IN THIS AP-  
PEAL.

(1) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company and/or its stockholders of property without due process of law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin, when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin, except the receipt of such dividends as were paid to Wisconsin stockholders.

108 Furthermore, the funds from which such dividends were paid cannot be said to be Wisconsin funds, but are general funds of the company deposited in St. Paul banks and derived from remittances from purchasers from the earnings



Page of  
Record.

from earnings from the St. Paul, Minnesota, Detroit, Michigan, and Copley, Ohio, factories of the company, earnings from companies in which the taxpayer owns a substantial amount of stock, earnings from doing business in foreign countries, earnings from royalties, dividends from stock owned by the company, interest from bonds owned by the company, interest from federal instrumentalities, none of which have a taxable situs in the State of Wisconsin.

That the State of Wisconsin has no power to levy any excise tax on the privilege of receiving and paying out dividends since said privilege is not granted by and could not be constitutionally be denied by the State of Wisconsin, such privilege being granted under the laws of the States of Delaware and Minnesota and exercised pursuant to the laws of such states.

That even if said law might be held to be constitutional from a jurisdictional standpoint insofar as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the state and/or to dividends paid by Wisconsin corporations, said act so applied would be contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article VIII, Section 1, of the Constitution of the State of Wisconsin, since it would be a denial of equal protection of the laws to residents of Wisconsin and as to Wisconsin corporations it would not be uniform and would contain unreasonable exemptions.

That the tax is on the payment and receipt of dividends and that as it is in part levied upon an unconstitutional subject and as no basis for apportionment exists, the whole assessment is invalid.

109 That it is apparent from the structure of Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, under which this tax is assessed, that the legislature contemplated that a tax would be imposed upon all dividends paid from earnings derived from business and property within the state. To restrict the application of the law to dividends received within the State of Wisconsin would so alter and restrict it that it is apparent the legislature would not have passed it in so limited a form. Consequently the entire law is ineffective, notwithstanding the provisions of Section 4 of Chapter 505 of the Laws of 1935 and amendments thereto.

That even if the tax might be held to be valid insofar as it levies a tax on dividends paid to and received by Wisconsin residents within the state, it is invalid insofar as it purports to levy a tax on dividends paid and received outside of Wisconsin by non-residents of Wisconsin. In such cases the entire payment and receipt of said dividends takes place outside of the State of Wisconsin, and consequently said state has no jurisdiction to levy an excise tax. That all except \$131.49 of said assessment represents taxes levied upon

Page of  
Record.

the payment of such dividends. This proportion is presented as an alternative and is not to be construed as an admission that the law is valid insofar as it taxes dividends paid to Wisconsin residents or as an abandonment of the principal position taken that the whole law and the tax assessed thereunder is invalid.

- (2) That said law is further unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1, of the Constitution of the State of Wisconsin, because it is a direct tax upon the Minnesota Mining and Manufacturing Company stock. The state of Wisconsin has no jurisdiction to tax said stock insofar as it is owned by persons not residing within the state.
- 110 All of the tax, except \$131.49 thereof, was levied with respect to dividends paid upon stock owned by non-residents of the State of Wisconsin.

(3) That said Section 3 of Chapter 305 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1, of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company of liberty and property without process of law, in that it requires it to file returns, keep detailed figures and accounts, to collect the tax by making deductions from dividends paid and to perform numerous

Page of  
Record.

other acts within the State of Minnesota. That the State of Wisconsin has no jurisdiction to require the Minnesota Mining and Manufacturing Company to do such acts within the State of Minnesota in order to assist it in collecting said tax levied by said section and the amendments thereto.

(4) That Section 3 of Chapter 505 of the Wisconsin Session Laws for 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I of Section 1 of the Constitution of the State of Wisconsin, because when declared a dividend became a debt of the company. The tax is in effect a direct tax upon such debt which has no taxable situs in the State of Wisconsin.

(5) That Section 3 of Chapter 505 of the Wisconsin Session Laws for 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1, of the Constitution of the State of Wisconsin because it attempts to levy a tax upon dividends paid from earnings accumulated before its passage. That accumulated earning cannot be apportioned as to time and therefore the tax is  
111 unconstitutional as to 1936 dividends because it is retroactive and in effect a tax upon accumulated surplus that does not have a taxable situs in the State of Wisconsin.



Page of  
Record.

(6) That Section 3 of Chapter 505 of the Wisconsin Session Laws for 1935 and amendments thereto is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, and Article VI of Section 1 to the Constitution of the State of Wisconsin, because it attempts to impose an excise tax upon the payment and receipt of dividends paid out of Wisconsin earnings. Other earnings are exempt. Such exemption is a denial of equal protection of the laws and unreasonable. Such tax is also not uniform.

(7) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article I, Section 10 of the Constitution of the United States of America and Article I, Section 12 of the Constitution of the State of Wisconsin, because it impairs the obligation of contract. Said law impairs the contract of the stockholders with the corporation under the general corporate charter and under the dividend resolutions by which the shareholders received a right to the dividends in question. Said law further impairs the contract of the corporation with the States of Delaware, Minnesota and Wisconsin.

(8) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article IV, Section 1 of the Constitution of the United States of

Page of  
Record.

America, because it fails to give full faith and credit to the laws of the States of Delaware and Minnesota, and the corporate charter, by-laws and resolutions of the Minnesota Mining and Manufacturing Company drawn pursuant thereto, which give it the right to conduct its business and declare dividends in the State of Minnesota.

- 112 (9) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto is unconstitutional under Article I, Section 8 of the Constitution of the United States of America because it interferes with the power of Congress to regulate commerce among the several states. Said law interferes with the free transmission of corporate funds from state to state.

(10) That said assessment is further void because the same was calculated pursuant to the statutory presumption under Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, that the dividends in question were paid from the previous year's income and contain an exact proportionate part of the Wisconsin earnings for such year. Such presumption contained in the law in question is plainly not in accord with the true facts and has been rebutted by the proof as made, and if not so rebutted the same is void, is arbitrary and unreasonable and unconstitutional under the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Wisconsin Constitution.

(11) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it deprives the Minnesota Mining and Manufacturing Company and/or its stockholders of liberty and/or property without due process of law, in that it imposes upon non-resident stockholders what is in effect a tax upon incomes of such stockholders although such income is not earned within the State of Wisconsin nor derived from property or business conducted within such state.

113 (12) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder is unconstitutional under Article I, Section 8, paragraph 2, of the Constitution of the United States of America in that it imposes a tax upon federal instrumentalities and interest derived therefrom.

(13) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1,

Page of  
Record.

of the Constitution of the State of Wisconsin, in that it is in effect imposing a tax upon interest and dividends received by the Minnesota Mining and Manufacturing Company from intangibles having no taxable situs within the State of Wisconsin.

(14) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, in that it is in effect imposing a tax upon incomes from royalties received by the Minnesota Mining and Manufacturing Company which incomes have no taxable situs in the State of Wisconsin.

(15) That said assessment as modified and corrected by the Wisconsin Tax Commission, insofar as it includes as part of the base upon which computation of tax is made so-called "dividends" on treasury stock owned by the company, is void in that Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto does not contemplate that such so-called "dividends" be subjected to tax.

(16) That Section 3 of Chapter 505 of the  
114 Wisconsin Session Laws of 1935 and amendments thereto and the purported tax levied thereunder, is unconstitutional under Section I of the Four-



Page of  
Record.

teenth Amendment to the Constitution of the United States of America in that it is using the earnings of the Minnesota Mining and Manufacturing Company earned outside of the State of Wisconsin as a base for said privilege dividend tax and this is in effect imposing a tax upon earnings of the Minnesota Mining and Manufacturing Company earned outside of the State of Wisconsin.

The appellant herein has availed itself of the remedies provided by the Statutes of the State of Wisconsin, and particularly Sections 71.12, 71.14 and 71.17.

**MINNESOTA MINING AND  
MANUFACTURING COMPANY**

By H. P. Buetow

Ass't Secretary

**FREDERICK J. MILLER**

American National Bank Bldg.  
Little Falls, Minnesota

**JOHN L. CONNOLLY**

791 Forest Street  
St. Paul, Minnesota

**ELA, CHRISTIANSON & ELA**

One West Main Street  
Madison, Wisconsin

**EXHIBIT I.**

115

Office of

**WISCONSIN TAX COMMISSION***In the Matter of the Appeal of***MINNESOTA MINING AND MANUFACTURING COMPANY**

from an Assessment of Privilege Dividend Taxes  
with Respect to Dividends Paid in the Year 1936

**DECISION**

This matter involves an assessment of privilege dividend taxes under the provisions of Section 3 of Section 71.60, Stats. 1937, with respect to dividends paid in 1936. The assessment is the result of a field audit by the Tax Commission's auditor.

The taxpayer offers evidence to the effect that the Minnesota Mining and Manufacturing Company, the appellant herein, is a corporation duly organized and existing by virtue of the laws of the state of Delaware, with its principal place of business in the city of St. Paul, state of Minnesota, and operating a factory for the manufacturing of colorquartz at Wausau, Wisconsin. The First Trust Company of St. Paul is the transfer agent for the taxpayer. All dividends were declared at a meeting of the board of directors in

Page of  
Record.

St. Paul, and all dividends paid by the taxpayer during the period affected by the tax in question were paid to the transfer agent in St. Paul by a check drawn on a St. Paul bank and by it distributed to the stockholders of the taxpayer. The taxpayer had 961,260 shares of common stock distributed in practically every state in the Union; 3,006 shares of stock were owned by residents of the state of Wisconsin. There was no preferred stock outstanding.

- 116 The sales of the products of the taxpayer are largely made from the Chicago office of the taxpayer, and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the taxpayer and deposited by the taxpayer in banks in St. Paul. All books and records covering the Wausau operations of the taxpayer are kept in St. Paul. All wages are paid directly from St. Paul. The receipts from the Wausau factory are commingled with the earnings from the taxpayer's factories at other places outside the state.
- During the year 1930, the taxpayer acquired all of the outstanding capital stock of the Baeder-Adamson Paper Mills, Inc., Philadelphia, Penna., for a consideration of \$1,267,306.66 for 10,000 shares. A year or two later, they sold 5,000 shares for \$633,650. During the year 1931, this concern discontinued operations, and, in 1935, the buildings were sold to a wrecking company for \$1,500 and the land was sold during the same year at a sheriff's sale to satisfy creditors.

In 1933 and 1934, after the Baeder-Adamson Paper Mills, Inc., discontinued operations, taxpayer set up on its books a reserve for loss on this stock in the amount of \$390,656.66. When the property was sold in 1935, the loss charged on the books of the taxpayer was the sum of \$243,000. The state's auditor, in determining this tax, charged off \$633,656.66 as a loss in 1935, thus reducing the taxpayer's total income from \$2,155,116.96 to \$1,764,460.30 and increasing the Wisconsin percentage of its total income from 12.1180 to 14.8010.

117 The auditor did not charge a tax on the dividend of \$371.25 on the taxpayer's treasury stock paid on January 2, 1936. The difference between the auditor's figures as to dividends paid and taxpayer's figures of dividends actually paid is accounted for by the fact that the auditor has imposed a tax on subsequent dividends of \$1,866.25 on the taxpayer's treasury stock.

On August 13, 1937, the Income Tax Division duly notified the taxpayer that it owed a privilege dividend tax of \$6,382.75, with interest amounting to \$501.01, computed to September 30, 1937; and on August 18, 1937, the taxpayer duly applied for hearing on said privilege dividend tax before the Wisconsin Tax Commission.

The taxpayer contends that its Wisconsin business is susceptible to separate accounting, and the taxpayer has filed its 1936 income tax return on a basis of separate accounting, which return has been approved by the Income Tax Division on that basis.



In 1935 and 1936, the taxpayer received income from intangible property, including royalties, dividends, and interest, some of the interest being on securities issued by the United States Government. None of the intangibles had a situs in Wisconsin, and the auditor for the Tax Commission did not include any part of the income from intangible property. The income from intangibles was included by the auditor in total income in determining the ratio of Wisconsin income to such total income.

In 1936, Minnesota Mining and Manufacturing Company held shares of its own stock in its treasury. In the balance sheets this stock was shown among the liabilities as outstanding stock and among the assets as an investment. In paying dividends, the taxpayer issued one check to its transfer agent for the total amount of the dividend and the transfer agent then issued dividend checks to the stockholders. Dividends on treasury stock were included in the check drawn to the transfer agent and the taxpayer received from such agent a check for the dividends on treasury stock. The amounts thus received in 1936 totaled \$2,237.50, of which \$371.25 was paid on January 2, 1936, and the remainder of 118 \$1,866.25 was paid subsequent to that date.

The author incorrectly applied a tax rate of 2.5641 per cent to the portion of the dividends which the auditor determined were paid out of Wisconsin income.

Page of  
Record.

The first question to be determined by the Commission is whether or not the privilege dividend tax law is constitutional. The Commission has held in different cases that it has no power to pass upon the constitutionality of the privilege dividend tax law. Furthermore, the Commission is of the opinion that the constitutionality of the privilege dividend tax law was passed upon by *State ex rel. Froedtert G. & M. Co., vs. Tax Comm.*, 221 Wis. 225.

The next question is whether the privilege dividend tax may be imposed with respect to dividends paid on treasury stock. It is generally conceded that every person owning stock has the same right to share in dividends, in accordance with the rule laid down in *Hartley vs. Pioneer Iron Works*, 181 N. Y. 73; 73 N. E. 576. Eight states have deemed it necessary to provide by statute that no dividends be paid on treasury stock. The fact that these eight states have thought it necessary to enact such legislation is an argument in favor of the proposition that if there is no such statute, and Wisconsin has none, then treasury stock is entitled to participate in dividends. In the same case it is held that dividends may be declared on treasury shares, to be applied to the purchase price of the shares for the benefit of certain persons who have contracted to buy them. In the instant case, the corporation paid the dividends on its treasury stock, the money was turned over to the fiscal agent, and a dividend check was returned to the corporation.

Page of  
Record.

Under the facts as shown in this case, and the rule laid down in the *Hartley* case, and in accordance with subsection (7) of the dividend tax law, 119 which provides that dividends shall be defined as they are in section 71.02 of the statutes, the Commission must hold that the treasury stock of this corporation was properly assessed.

Did the income tax auditor base the privilege dividend taxes as assessed solely upon income earned in Wisconsin? The taxpayer's brief states that the Wisconsin income was only \$245,941.39, while the auditor's report shows that the income out of the Wisconsin business amounted to \$248,927.48. But by reason of the concession relating to Baeder Adamson Paper Mills, Inc., stock, the dividends from Wisconsin income are reduced to approximately \$218,000. While this disposes of the taxpayer's argument, it should be noted that the 1935 Wisconsin income was \$261,157.62, and it must be accepted as the amount of Wisconsin income available for dividends. The figure used by the taxpayer is nowhere shown in the record but is computed by deducting the 1934 loss of \$15,216.23 from the 1935 admitted income. The fact that in a computation of normal income taxes the Legislature has allowed 1935 income to be offset by the 1934 net business loss is without effect in the computation of the earnings attributable to Wisconsin for privilege dividend tax purposes and has no effect upon the amount of 1935 income available for dividends.

Are the privilege dividend taxes, as determined by the auditor, based in part upon dividends on income from intangible property? The taxpayer contends that the tax has been imposed with respect to dividends paid out of royalties, dividends and interest received, including the interest on federal securities. This argument proceeds from the assumption that all of the income from intangible property received in 1935 was paid out in 1936 dividends. There is nothing in the record to support this argument. There is nothing to show that the proportion of intangible income paid out in dividends is any higher or any different than the proportion of other types of income thus distributed. The ratio of total  
120 dividends of \$1,682,200.05 to total income of \$2,007,460.30 is roughly 85 per cent. That proportion of the total income was paid out in dividends and there is no ground for the assertion that any higher percentage of income from intangible property was distributed to the stockholders.

The interest, dividends and royalties are included in total income but are not included in Wisconsin income. They are thus treated as income from sources outside of the state, and the method of computation used by the auditor does not impose a privilege dividend tax on their distribution. The result reached by this computation is the same result which would be reached if the ratio of total dividends to the total income were to be applied to the Wisconsin income, and



this clearly demonstrates that no privilege dividend tax is imposed with respect to income from intangible property having a situs outside of the state. The taxpayer subtracts the interest, dividends and royalties from the total dividends paid and applies to the remainder a fraction which has as its denominator this total income, including that from intangibles. This method obviously gives double effect to the intangible income.

The taxpayer's argument that that portion of the loss which was charged to the reserve should not be used to reduce 1935 income, since provision for this loss had to that extent been made in prior years, and that such portion of the loss should be ignored in determining the 1935 income available for dividends, was well taken. The auditor was mistaken in using the tax rate of 2.5641 per cent in computing the privilege dividend taxes here involved. The rate which should have been used is 2.5 per cent, and the taxes should be recomputed to give effect to this change.

### FINDINGS.

121 *THE COMMISSION FINDS* That the privilege dividend tax in the instant case was properly assessed on treasury stock.

*IT FURTHER FINDS* That the income tax auditor assessed the privilege dividend taxes solely upon income earned in Wisconsin.

*IT FURTHER FINDS* That the ratio of total dividends of \$1,682,200.05 to total income of \$2,007,460.30 is roughly 85 per cent. That proportion of the total income was paid out in dividends and there is no ground for the assertion that any higher percentage of income from intangible property was distributed to the stockholders. The interest, dividends and royalties are included in total income but are not included in Wisconsin income, and the method of computation used by the auditor does not impose a privilege dividend tax on their distribution.

*IT FURTHER FINDS* That that portion of the loss which was charged to the reserve should not be used to reduce the 1935 income since provision for this loss had to that extent been made in prior years, and that such portion of the loss should be ignored in determining the 1935 income available for dividends.

*IT FURTHER FINDS* That the Auditor was mistaken in using the tax rate of 2.5641 per cent in computing the privilege dividend taxes here involved. The rate which should have been used is 2.5 per cent.

*IT FURTHER FINDS* That it has no power to pass upon the constitutionality of the privilege dividend tax law.

***BLANK PAGE***

## MINNESOTA MINING AND MANUFACTURING COMPANY.

Recomputation of Privilege Dividend Taxes, Giving Effect  
to Adjustment of Tax Rate and to Recomputation of Per-  
centage of Dividends Paid Out of Wisconsin Income (In-  
cluding Dividends on Treasury Stock.)

DATE PAID	1-2-36	4-1-36	7-1-36	10-1-36	12-22-36	TOTALS
Total Dividends per Original Audit Report	\$125,909.83	\$216,380.97	\$288,278.00	\$336,441.00	\$624,819.00	\$1,681,828.80
Dividend on Treasury Stock not Included in Above	371.25					371.25
Total Dividends as Adjusted	\$216,281.08	\$216,380.97	\$288,278.00	\$336,441.00	\$624,819.00	\$1,682,200.05
Per cent Paid from Wisconsin Income (Exhibit B)	13.0093	13.0093	13.0093	13.0093	13.0093	
Dividends from Wisconsin Income Rate of Tax	\$ 28,136.65 .025	\$ 28,149.65 .025	\$ 37,502.95 .025	\$ 43,768.62 .025	\$ 81,284.58 .025	\$ 218,842.45
Corrected Privilege Dividend Tax	\$ 703.42	\$ 703.74	\$ 937.57	\$ 1,094.22	\$ 2,032.11	\$ 5,471.06
Penalty and Interest to March 1, 1939	140.68	130.19	159.39	169.60	294.66	894.52
Total	\$ 844.10	\$ 833.93	\$ 1,096.96	\$ 1,263.82	\$ 2,326.77	\$ 6,365.58



***BLANK PAGE***

## DECISION

*IT IS, THEREFORE, ORDERED* That the assessment herein be recomputed in accordance with our findings.

*IT IS FURTHER ORDERED* That the assessment as computed be placed on the tax roll, and that proper notice be given to the parties to this appeal of this decision.

Dated at the State Capitol, Madison, Wisconsin, this 19th day of December, 1938.

## WISCONSIN TAX COMMISSION

W. J. Conway

Henry A. Gunderson

Herbert L. Mount

Commissioners.

---

Exhibit II—Folded Insert.

**EXHIBIT B****MINNESOTA MINING AND MANU-  
FACTURING COMPANY.****Recomputation of Percentage of Divi-  
dends Paid in 1936 Out of Income from  
Wisconsin Property and Business.**

Total 1935 Income per Original Au- dit Report	\$1,764,460.30
Adjustment for Loss on Baeder Adamson Paper Mills Company Stock Charged to Reserve, per Tax Commission Decision	243,000.00
Total 1935 Income as Adjusted	\$2,007,460.30
Wisconsin Income for 1935	261,157.62
Ratio of Wisconsin Income to Total Income	13.0093%

**126-127 ANSWER OF TAX COMMISSION ON  
APPEAL TO CIRCUIT COURT.**

(Omitting title.)

126 For answer to the objections raised by the Appellant in the above-entitled action, the above-named Respondent, appearing by the Attorney General and Harold H. Persons, Assistant Attorney General, say that the assignments of error are without support in the law, or in the facts as shown by the record made up of copies of all the

Page of  
Record.

documents, papers; evidence, statements and exhibits on file in the matter and all the testimony taken down, returned into court pursuant to Sec. 71.16, Wis. Stats.

JOHN E. MARTIN,  
Attorney General,

HAROLD H. PERSONS,  
Assistant Attorney General,  
Attorneys for Respondent.

2 Return of Tax Commission on Appeal to Clerk of Circuit Court, Dane County (omitted).

3 Index of Transcript of Testimony Before Tax Commission (omitted).

7-43 PROCEEDINGS BEFORE TAX COM-  
MISSION.

7 Title Page (omitted).

8 Index of Testimony Before Tax Commission (omitted).

9 **PRESENT:** Before Commissioners Wm. J. Conway, Herbert L. Mount, and Henry A. Gunderson. Appearances: For the Income Tax Division of the Tax Commission: John S. Best, Esq., Income Tax Counsel. For the Taxpayer: Frederick J. Miller, Esq., of Little Falls, Minnesota, and John L. Connolly, Esq., of St. Paul, Minnesota.



ABSTRACT OF PROCEEDINGS AND  
TESTIMONY.

10 Mr. Best: If the Commission please, this is an appeal from an assessment of privilege dividend taxes with respect to dividends paid by the Minnesota Mining and Manufacturing Company in the year 1936.

We offer in evidence the stipulation of facts agreed to between the parties and request that the reporter mark it Exhibit 1.

Stipulation of facts marked Exhibit 1, AJK.

Mr. Miller: No objection as far as we are concerned.

Document marked Exhibit 2, AJK.

Mr. Best: The reporter has marked as Exhibit 2 copy of letter from Wisconsin Tax Commission to Minnesota Mining and Manufacturing Company dated August 13th, 1937, being the notice of the assessment here involved, attached to which is a return receipt for registered mail. We offer Exhibit 2 in evidence.

Mr. Miller: No objection.

Commissioner Conway: Received.

Document marked Exhibit 3, AJK.

Mr. Best: The reporter has marked as Exhibit 3 the Tax Commission's audit report of privilege dividend tax payments by the Tax Commission's auditor, Mr. Stillman Kuhns, dated July 3rd, 1927. We offer Exhibit 3 in evidence.

Mr. Miller: No objection.

Commissioner Conway: Received.

Document marked Exhibit 4, AJK.

11 Mr. Best: The reporter has marked as Exhibit 4 a letter from Minnesota Mining and Manufacturing Company to Wisconsin Tax Commission dated August 18th, 1937, being the taxpayer's original protest and request for hearing in this matter, which we offer in evidence.

Mr. Miller: No objection.

Commissioner Conway: Received.

Document marked Exhibit 5, AJK.

Mr. Best: The reporter has marked as Exhibit 5 copy of letter from Wisconsin Tax Commission to Minnesota Mining and Manufacturing Company, dated August 19th, 1937 acknowledging receipt of the taxpayer's protest. We offer Exhibit 5 in evidence.

Mr. Miller: No objection.

Commissioner Conway: Received.

Document marked Exhibit 3, AJK.

Mr. Best: The reporter has marked as Exhibit 6 a letter from Minnesota Mining and Manufacturing Company to Wisconsin Tax Commission dated March 17th, 1938, attached to which is an amendment to the taxpayer's protest made August 8th, 1937.

Mr. Miller: No objection.

Mr. Best: This Exhibit should be part of the record to complete the picture here. It contains some statements of fact which we feel are immaterial and we request that it be made a part of the record as showing the issues raised by the taxpayers herein without conceding the correctness or materiality of it in Exhibit 6.

Page of  
Record.

Mr. Miller: There are one or two errors which we would like to correct by testimony.

Mr. Best: No objection to that manner of treating it.

Commissioner Conway: You are offering Exhibit 61

12 Mr. Best: Yes, with the conditions I stated.

Commissioner Conway: With that understanding there is no objection.

Mr. Miller: There are a couple of errors we would like to correct by the testimony of Mr. Buetow.

Commissioner Conway: You may proceed.

#### 60-63 EXHIBIT 1—Stipulation of Facts.

(Title omitted.)

#### STIPULATION OF FACTS

60

It is hereby stipulated by and between John S. Best, Income Tax Counsel of Wisconsin Tax Commission, for and on behalf of the State of Wisconsin, and John L. Connolly and Frederick J. Miller, attorneys for and on behalf of the Minnesota Mining and Manufacturing Company, a corporation, that in determination of the above protest by the Commission the following facts are admitted:

#### I

That the Minnesota Mining and Manufacturing Company, hereinafter referred to as the

Page of  
Record.

61 "taxpayer," is a corporation duly organized and existing by virtue of the laws of the State of Delaware, with its principal place of business in the City of St. Paul, State of Minnesota, operating a factory manufacturing colorquartz at Wausau, Wisconsin; the First Trust Company of St. Paul is the transfer agent for the taxpayer; all dividends were declared at meetings of the Board of Directors in St. Paul, no dividends were declared in Wisconsin, all dividends paid by the taxpayer during the period affected by the tax in question were paid to the transfer agent in St. Paul by a check drawn on a St. Paul bank and by it distributed to the stockholders of the taxpayer.

## II.

During the year 1930, the taxpayer acquired all of the outstanding capital stock (except qualifying shares) of the Baeder Adamson Paper Mills, Inc., Philadelphia, Penn., for a consideration of \$1,267,306.66 or \$126.73 per share for 10,000 shares.

Cost of Stock	\$1,267,306.66
Less Cost of 5,000	
Shares Sold 1931-33	633,650.00
Cost of 5,000 Shares	
Unsold	\$ 633,656.66

During the year 1931, the Baeder Adamson Paper Mills, Inc., discontinued operations. In 1935 the buildings were sold to a wrecking company for \$1,500.00 and the land was sold during the same year at a sheriff's sale to satisfy creditors.



Page of  
Record.

62 After the Baeder Adamson Paper Mills, Inc., discontinued operation, taxpayer set up on its books a reserve for loss on this stock in the amount of \$390,656.66. On December 31, 1935, part of the actual loss of \$633,656.66 was charged to this reserve. The Commission, in arriving at the total taxable income for the year 1935, charged off as a loss the sum of \$633,656.66, being the figure at which the Baeder Adamson Paper Mills, Inc., stock was carried on the books of taxpayer immediately prior to December 31, 1935, and being the amount charged off by the taxpayer on that date, less \$390,656.66 reserve hereinbefore mentioned.

### III.

That the total book income of the taxpayer for the year 1935 was \$2,250,775.45 and that the total income appearing on Schedule 2 of the Audit of Privilege Dividend Tax Payments by Wisconsin Tax Commission, dated July 3, 1937, was determined as follows:

Book Income	\$2,250,775.45
Loss on Baeder Adamson Paper Mills, Inc., Stock	633,656.66
Life Insurance Premiums	4,195.85
Federal Income Taxes Reserved	350,000.00
Federal Income Taxes Paid	206,854.34
Total Income Per Audit Report	\$1,764,460.30

IV.

That on August 13, 1937, the Wisconsin Tax Commission duly notified the taxpayer that it owed a privilege dividend tax of \$6,382.75, with interest amounting to \$501.01, computed to September 30, 1937; and on August 18, 1937, the taxpayer duly applied for hearing on said privilege dividend tax before the Wisconsin Tax Commission.

V.

63 That the taxpayer's business in Wisconsin is susceptible to separate accounting, and the taxpayer has filed its 1936 income tax return on a basis of separate accounting, which return has been approved by the Wisconsin Tax Commission on that basis.

• • • • •

The taxpayer and the State of Wisconsin shall have the right at the hearing before the Wisconsin Tax Commission to introduce additional evidence with respect to the issues involved in this appeal.

Dated this 14th day of April, 1938.

JOHN A. BEST,  
Income Tax Counsel,

FREDERICK J. MILLER,

JOHN L. CONNOLLY,  
Attorneys for Minnesota  
Mining and Manufacturing  
Company.

Page of  
Record.

65- **EXHIBIT 2**—Return Receipt of Registered  
66 Letter and Letter of Wisconsin Tax  
Commission to Minnesota Mining and  
Manufacturing Company, Dated August  
13, 1937, Assessing Privilege Dividend  
Tax.

(Return receipt omitted.)

66

August 13, 1937

Minnesota Mining & Manufacturing Company,  
791 Forest Street,  
St. Paul, Minnesota.

In Re: 99-17923

Gentlemen:

We are enclosing a copy of the report of our  
auditor, Mr. Stillman Kuhns, covering verifica-  
tion of your privilege dividend tax payments for  
1935 and 1936.

The total additional privilege dividend tax shown  
on Schedule 1 of the enclosed report plus penalty  
and interest to September 30, 1937, is \$6,883.76,  
and we are enclosing a bill for this amount.

You are hereby notified of the above additional  
assessment pursuant to Sections 71.10, 71.11,  
71.115 and 71.12 of the Statutes.

If you desire a hearing in this matter, it will be  
necessary for you to apply therefor in writing  
stating definitely and in detail your objections to  
the assessment. Such application must be filed  
in duplicate within twenty days from the receipt  
of this notice.

Page of  
Record.

If a hearing is applied for, you may, under Section 71.10 (6) (a), elect to deposit with the State Treasurer the total amount of the additional taxes set forth above together with interest thereon to the first day of the month succeeding the application for hearing. Your election to so deposit these taxes must be expressed in your application for hearing.

If no request for hearing is made within the time specified above, the assessment will become final and conclusive.

Yours very truly,

WISCONSIN TAX COMMISSION  
Income Tax Division

By: .....

Joel S. Hendrickson  
Chief Auditor

JSH:W

Enc.

Registered Mail

Return Receipt Requested

70

Minneapolis, Minnesota,  
July 3, 1937.

Wisconsin Tax Commission  
State Capitol,  
Madison, Wisconsin.

Dear Sirs:

Attached are exhibits showing the computation of additional privilege dividend tax due from the Minnesota Mining and Manufacturing Company.



Page of  
Record.

The additional tax represents the total privilege dividend tax liability incurred during the years 1935 and 1936 inasmuch as no privilege dividend tax has previously been paid.

Respectfully submitted,

Stillman Kuhns,  
Field Auditor.

**Exhibit 3—Folded Insert.**

75- **EXHIBIT 4**—Letter of Minnesota Mining and  
76 Manufacturing Company to Wisconsin  
Tax Commission, Protesting Privilege  
Dividend Tax and Demanding Hearing  
(omitted).

77- **EXHIBIT 5**—Letter of Wisconsin Tax Com-  
78 mission to Minnesota Mining and Man-  
ufacturing Company, Acknowledging  
Receipt of Protest and Demand for  
Hearing (omitted).

80- **EXHIBIT 6** — Letter of Transmittal and  
91 Amended Protest.

(Omitting letter of transmittal and title  
of amended protest and verification.)

80 **AMENDMENT TO PROTEST MADE  
AUGUST 18, 1937.**

The Minnesota Mining and Manufacturing  
Company, a Delaware corporation, duly author-  
ized to transact business as a foreign corporation  
in Wisconsin, hereby files objections to an addi-

***BLANK PAGE***

**EXHIBIT 3, Audit of Privilege Dividend Tax Enclosed in Letter of August 13, 1937.**

(Title page and table of contents omitted.)

71

**SCHEDULE 1.**

**MINNESOTA MINING AND MANUFACTURING COMPANY.**

**Computation of Additional Privilege Dividend Tax—1936.**

<i>Dividends Paid</i>	1/2/36	4/1/36	7/1/36	10/1/36	12/22/36	Total
Total Dividend	\$215,909.83	\$216,380.97	\$288,278.00	\$336,441.00	\$624,819.00	\$1,681,828.80
Per Cent Taxable (Schedule 2)	14.8010	14.8010	14.8010	14.8010	14.8010	14.8010
Taxable Dividend	\$ 31,956.81	\$ 32,026.55	\$ 42,668.03	\$ 49,796.63	\$ 92,479.46	\$ 248,927.48
Rate of Tax	2.5641	2.5641	2.5641	2.5641	2.5641	2.5641
Amount of Tax	\$ 819.40	\$ 821.19	\$ 1,094.05	\$ 1,276.84	\$ 2,371.27	\$ 6,382.75
Penalties and Interest						
Total Privilege Dividend Tax and Interest						

72

**SCHEDULE 2.**

**MINNESOTA MINING AND MANUFACTURING COMPANY.**

**Computation of Per Cent of Divident Declared and Paid  
Out of Income Derived from Property Located and Business Transacted in Wisconsin.**

1935—Total Income	\$1,764,460.30
1935—Wisconsin Income	261,157.62
Percentage of Wisconsin to Total	14.8010

73

**SCHEDULE 3.**



72

SCHEDULE 2.

MINNESOTA MINING AND MANUFACTURING COMPANY.

Computation of Per Cent of Divident Declared and Paid  
Out of Income Derived from Property Located and Business Transacted in Wisconsin.

1935—Total Income	\$1,764,460.30
1935—Wisconsin Income	261,157.62
Percentage of Wisconsin to Total	<u>14.8010</u>

73

SCHEDULE 3.

MINNESOTA MINING AND MANUFACTURING COMPANY.

Summary of Dividends Declared and Paid—  
September 26, 1933 to December 31, 1936.

Type of Stock	Date Declared	Date Paid	Amount
Common	12-16-35	1-2-36	\$ 215,909.83
Common	3-10-36	4-1-36	216,380.97
Common	6-17-36	7-1-36	288,278.00
Common	9-22-36	10-1-36	336,441.00
Common	12-7-36	12-22-36	624,819.00
Total Dividends Declared			<u>\$1,681,828.80</u>



***BLANK PAGE***

Page of  
Record.

tional assessment of privilege dividend taxes in the principal amount of \$6,382.75, with interest amounting to \$501.01, in respect of dividends assessed against the company between the 16th day of December, 1935, and the 22nd day of December, 1936, both inclusive, by notice dated August 13, 1937, and pursuant to audit report dated August 13, 1937. In accordance with the statutes of the state of Wisconsin, and particularly Chapter 233 of the Laws of 1937, and Wisconsin Statutes, Section 71.12, the company hereby applies for a hearing.

The period prescribed by law within which this application may be filed has been duly extended by the Tax Commission to September 2, 1937.

The objections to said assessment and the facts in support of such objections are as follows:

- 81 1. The Minnesota Mining and Manufacturing Company is a Delaware corporation which conducts, and at the times hereinafter mentioned, did conduct a manufacturing business in the states of Minnesota, Wisconsin, Michigan and Ohio, and sells its products in several states in the Union and in foreign countries. The company owns a substantial amount of stock in corporations, has earnings accruing to it from royalties, and interest from federal securities. That the principal office of the company is in Wilmington, Delaware. Meetings of all the stockholders are held in St. Paul, Minnesota. That the principal business office at which all the meetings of the directors are held is in St. Paul, Minnesota.

Page of  
Record.

2. On each of the dates fixed as a record date for the determination of the stockholders entitled to receive each of the dividends upon which a privilege dividend tax was assessed against the company there have been in excess of 2,300 stockholders of the company residing in all parts of the United States holding an aggregate of 961,260 shares of common stock. On each of said dates the number of such stockholders residing in the state of Wisconsin has not been greater than 40, and the number of shares of stock held by such stockholders has not been greater than 5,315. The number of shares of stock held by and the amount of dividends paid to all stockholders, including the stockholders resident in Wisconsin, on each of said dates is shown in Table A attached hereto and made a part hereof.

82 3. All meetings of the board of directors of the company at which dividends are declared are held in the state of Minnesota, and all acts of the company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the states of Minnesota and Delaware; and the funds out of which said dividends are paid are kept in the state of Minnesota. No act or transaction in connection with the declaration and payment of such dividends is done within the State of Wisconsin; with the sole exception that certain dividends so declared and paid, amounting in case of each of the dividends mentioned in Table A to less than .... of 1% of all the dividends de-

Page of  
Record.

clared and paid, are received by stockholders residing in the state of Wisconsin. The percentage, received by residents of Wisconsin, of the total of each of said dividends is set forth in Table A.

4. The process by which income earned in Wisconsin finally reaches stockholders of the Company is as follows:

The company has a factory at Wausau, Wisconsin, where it manufactures colorquartz and ships all the products of said factory to Chicago or points east. The sales of said product are made from the Chicago office of the company and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the company and deposited by the company in banks in St. Paul. All books and records covering the company's Wausau operations are kept in St. Paul. All wages of the company's employees at Wausau are paid directly from St. Paul. The receipts from the Wausau factory of the company are commingled with the earnings from the company's factory in St. Paul, Minnesota, Detroit, Michigan, Copley, Ohio, and with earnings from companies in which the company owns a substantial amount of stock, earnings from doing business in foreign countries, earnings from royalties, dividends from stock owned by the company, interest from bonds owned by the company; and after the payment of salaries, overhead and taxes, dividends are declared and paid from this fund.



Page of  
Record.

That the dividend payment is made by drawing a check or checks for the total amount to the order of the First Trust Company of St. Paul, which, itself, makes the actual payments to the stockholders.

5. That during the year 1935 the company received \$10,191.37 and during the year 1936, \$14,331.65, as earnings from the interest on federal securities, which earnings are included in the computation of earnings of the company as a basis for computing the privilege dividend tax assessed against the company.

6. During the year 1930, the taxpayer acquired all of the outstanding capital stock (except qualifying shares) of the Baeder Adamson Paper Mills, Inc., Philadelphia, Pennsylvania, for a consideration of \$1,267,306.66 or \$126.73 per share for 10,000 shares.

The net operating loss sustained by the subsidiary amounted to \$30,673.06, which, for income purposes, was reported in a consolidated return and was charged off prior to 1935.

Cost of stock	\$1,267,306.66
---------------	----------------

Net loss of subsidiary (loss previously charged off)	30,673.06
---	-----------

Reduced basis of 10,000 shares	1,236,633.60
Less reduced cost of 5,000 shares sold 1931-33	618,316.80

Reduced cost of 5,000 shares unsold	618,316.80
--	------------

During the year 1931, the Baeder Adamson Paper Mills, Inc. discontinued operations. In 1935 the buildings were sold to a wrecking company for \$1,500.00 and the land was sold during the same year at a sheriff's sale to satisfy creditors.

84 After the Baeder Adamson Paper Mills, Inc. discontinued operation, taxpayer set up on its books a reserve for loss on this stock in the amount of \$390,656.66. When the property was sold in 1935, part of the actual loss of \$618,316.80 was charged to this reserve. The Commission, in arriving at the total taxable income for the year 1935, erroneously charged off as a loss the entire amount of \$633,656.66. This loss had been definitely sustained prior to 1935, although not sustained for income tax purposes. The directors and officers of the company, in attempting to estimate it, set up a reserve of \$390,656.66. The setting up of this reserve has a definite bearing upon the dividend paid in years prior to 1935. The Commission should not deduct this entire amount during the year 1935 and in no event should deduct more than the difference between the actual loss and the reserve set up, which is \$227,760.14.

7. The taxpayer does not maintain a separate system of accounts for its operations at Wausau. The following is a statement of assets and liabilities in use in Wausau at the end of the years 1934, 1935 and 1936:

Page of  
Record.**ASSETS**

	Dec. 31, 1934	Dec. 31, 1935	Dec. 31, 1936
Cash	4,830.42	8,645.82	6,769.06
Real Estate	12,364.00	12,664.00	14,148.55
Buildings	189,420.87	361,149.46	370,084.52
Machinery	337,790.69	351,575.96	356,828.82
Colorquartz Machinery	179,259.66	256,736.74	257,004.25
Inventory	93,675.84	194,862.45	234,524.97
	817,341.48	1,185,634.43	1,303,272.17

**LIABILITIES**

Reserve for Depreciation—			
Buildings	6,535.60	17,547.02	32,171.71
Reserve for Depreciation—			
Machinery	34,353.48	67,821.40	103,184.42
Reserve for Depreciation—			
Colorquartz	15,658.41	37,658.65	63,225.34
Net Earnings	7,999.84	266,494.25	449,042.97
Accrued State Income Tax		2,663.21	3,635.80
Net Advances by St. Paul	752,794.15	793,449.90	652,011.93
	817,341.48	1,185,634.43	1,303,272.17

8. That the investment income of the taxpayer for the years 1935 and 1936 is as follows:

	1935	1936
Dividend	\$328,096.23	\$254,834.00
Interest	27,125.17	7,797.53
Interest on U. S.		
Obligations	10,191.37	14,331.65
Interest on State		
Obligations	173.25	920.68
	<u>\$365,586.02</u>	<u>\$277,883.86</u>

9. By reason of the facts above stated the transactions upon which the privilege dividend tax is attempted to be imposed in respect of Minnesota Mining and Manufacturing Company are wholly outside the jurisdiction of the state of Wisconsin, with the exception of the transfer of the dividends by the company to certain of its stockholders residing in Wisconsin, in which case the transaction takes place partly within and partly outside the jurisdiction of said state. To the extent that the privilege dividend tax is attempted to be imposed upon transactions wholly outside of the jurisdiction of the state, it is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside of the state, under the Constitution of the United States, in that it deprives them of liberty and/or property without due process of law.

10. Without prejudice to the statements in paragraph nine hereof, the aforesaid dividend tax law is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders who reside outside of the state of Wisconsin under the Constitution of the United States in that it deprives them of their liberty and/or property without due process of law, because it imposes upon such non-resident stockholders what is in effect a tax upon the income of such stockholders although such income is not earned within the



Page of  
Record.

state of Wisconsin nor derived from property or business conducted within such state, and in that it imposes upon the Minnesota Mining and Manufacturing Company a duty of paying and withholding from said stockholders an unconstitutional tax which requires the expenditure of time and money on the part of the company to compute, pay and withhold the tax. Although the privilege dividend tax makes the stockholders ultimately liable for the tax the company, nevertheless, has legal standing to object to the validity of the law for the reason that if the aforesaid privilege dividend tax law is unconstitutional the company is being subjected to an unconstitutional burden, and further because in practice it is impossible to withhold the exact amount of the tax from each stockholder, and it therefore becomes necessary for the company to pay a part of the tax out of its general funds.

- 87     -11. Without prejudice to the statements in paragraphs nine and ten hereof, the aforesaid privilege dividend tax law is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders under the Constitution of the United States, in that it deprives them of property without due process of law by imposing a tax upon the privilege of receiving and paying out dividends, which privilege is not granted by and could not constitutionally be denied by the state of Wisconsin, such privilege being granted by the state of Delaware and exercised pursuant to the laws of said state.

12. Without prejudice to the statements in paragraphs nine, ten and eleven hereof, the privilege dividend tax is unconstitutional and void insofar as it imposes a tax upon dividends which are paid by the company to stockholders residing outside of Wisconsin, because it is in effect a tax upon stock held by such stockholders or upon the dividend which is a debt of the company when declared, which are outside of the jurisdiction of the state, and such tax, therefore, deprives the Minnesota Mining and Manufacturing Company and its stockholders, residing outside the State of Wisconsin, of liberty and/or property without due process of law in violation of the provisions of the Constitution of the United States.

13. Without prejudice to the statements in paragraphs nine, ten, eleven and twelve hereof, the aforesaid privilege dividend tax law is wholly void for the reason that it is unconstitutional as applied to dividends paid to stockholders residing outside of Wisconsin and to restrict the application of the law to dividends paid by Wisconsin corporations or dividends paid by foreign corporations to stockholders residing in Wisconsin would be a denial of equal protection of the law to such corporations and such stockholders and a violation of the Constitution of the United States and the Constitution of Wisconsin. Further, to so restrict the application of the law, would be to impose a tax which the legislature of Wisconsin did not intend to impose, since, notwithstanding the provisions of Laws of 1935,

Chapter 505, Section 4, it is clear that the provisions of the act are based upon a plan to impose a tax which will fall equally upon resident and non-resident stockholders of corporations doing business in Wisconsin and that to so restrict the act would be to defeat the obvious intention of the legislature.

14. Without prejudice to the statements in paragraphs nine, ten, eleven, twelve and thirteen, the aforesaid privilege dividend tax law is unconstitutional and void under Article I, Section 10 of the Constitution of the United States and Article I, Section 12 of the Wisconsin Constitution because it impairs the obligation of the contract between the stockholders and the company under the corporate charter and dividend resolutions by which the stockholders received a right to dividends.

15. Without prejudice to the statements in paragraphs nine, ten, eleven, twelve, thirteen and fourteen hereof, the aforesaid privilege dividend tax law is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders who reside outside of the state of Wisconsin in that it deprives them of their liberty and/or property without due process of law because it imposes upon such stockholders in effect a tax on income which was earned by the Minnesota Mining and Manufacturing Company without the state of Wisconsin.

16. Without prejudice to the statements in paragraphs nine, ten, eleven, twelve, thirteen, fourteen and fifteen hereof, the aforesaid privilege dividend tax law is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders because it imposes in effect a state tax upon federal instrumentalities and the interest derived therefrom in violation of Article I, Section 8, par. 2, of the Constitution of the United States.

17. The company has not withheld from dividends paid to its stockholders any part of the dividend tax as required by Laws of 1935, Chapter 505, Section 3, subdivisions (1) and (3). In so failing to deduct such taxes the company did not intend to admit that it was liable therefor, or to assume any existing liability of its stockholders to pay the tax, but it failed to withhold the tax because it believed that said law was unconstitutional and void and that if the tax was collected from stockholders the company would be put to trouble and expense to refund to them amounts so withheld from them, and further that the company would be violating the constitutional rights of its stockholders if it acted as agent of the state to collect a tax levied under an unconstitutional law and that it would be violating the contract rights of its stockholders if it did not pay them the full amount of the dividend declared by its Board of Directors, deducting therefrom



Page of  
Record.

only the amounts of valid taxes which the company would be constitutionally required to deduct and withhold.

90 18. The company claims that the computation by the Tax Commission of the privilege dividend tax alleged to be due is erroneous even assuming that the aforesaid privilege dividend tax law is entirely valid and constitutional because of the following facts:

(a) That the net income of the company for the years 1934, 1935 and 1936, respectively, which was used by the Commission in assigning the dividends to Wisconsin was \$1,203,820.30 for 1934, \$1,764,460.31 for 1935, and \$3,064,903.00 for 1936. That the dividends paid by the company in 1935, 1936 and 1937, if they were paid at all, were paid out of net income for the previous calendar or fiscal year, and not paid out of the adjusted net income computed by the Tax Commission. The net income out of which the dividends are paid is the entire net income as shown by the books of the company and is not the adjusted net income which may be used for federal or state income tax purposes. In determining whether a dividend may lawfully be paid, reference is made solely to the net income and surplus or undivided profits on the books of the company and not the taxable net income as stated in any federal or state income tax return. The adjustments which have been made in book income were made by the company to reconcile its statement of federal taxable in-

Page of  
Record.

come with the changes in its surplus as shown by its books. These adjustments were made because of provisions in the federal income tax law allowing or disallowing certain types of deductions for tax purposes. The company knows no reason why such adjustments should be made in determining the income out of which dividends are paid.

- (b) The rate of tax prescribed by the privilege dividend tax law is 2.5%. The tax has been assessed upon the company at the rate of 2.5641%.
- 91 The reason for the increase in rate is stated to be that inasmuch as the tax is not deducted from the dividends paid to stockholders, the amount of the tax in itself constitutes a further dividend which is also subject to tax and that the tax rate was therefore adjusted to the rate of 2.5641%. The company claims, however, that to apply this adjusted rate is in effect to levy a tax upon the entire tax instead of upon that part of the tax which is derived from income from sources within the state of Wisconsin, and that the correct rate will take into account the additional factor of the ratio which the Wisconsin net income bears to the total net income of the company.

(c) That the Tax Commission has erroneously deducted \$633,656.66 as a loss sustained by the company in the year 1935, and as a result is attributing to Wisconsin income from sources without the state of Wisconsin in computing this tax.

(d) That the Tax Commission has failed to deduct the interest the company received from

Page of  
Record.

federal securities in determining the privilege dividend tax, and as a result is subjecting interest from federal securities to this tax.

*WHEREFORE*, the Minnesota Mining and Manufacturing Company demands that said privilege dividend tax of \$6,382.75 with interest amounting to \$501.01 be cancelled.

**MINNESOTA MINING AND  
MANUFACTURING COMPANY**

By H. P. Buetow  
Its Assistant Treasurer.

93 **EXHIBIT 7—Asset and Liability Statement.**

<i>ASSETS</i>	Dec. 31, 1934	Dec. 31, 1935	Dec. 31, 1936
Cash	4,830.42	8,645.82	6,769.06
Real Estate	12,364.00	12,664.00	14,148.55
Buildings	189,420.87	361,149.46	370,084.52
Machinery	333,790.69	351,575.96	356,828.82
Colorquartz Machinery	179,259.66	256,736.74	257,004.25
Inventory	93,742.75	194,868.45	266,509.27
<b>Total Assets</b>	<b>813,408.39</b>	<b>1,185,640.43</b>	<b>1,271,344.47</b>
<i>LIABILITIES</i>			
Reserve for Depreciation— Buildings	6,437.48	17,448.90	32,073.59
Reserve for Depreciation— Machinery	25,714.09	59,182.01	94,545.03
Reserve for Depreciation— Colorquartz	14,863.36	36,868.60	62,435.29
Net Earnings	7,999.84	266,494.25	449,042.97
Accrued State Income Tax		2,663.21	3,635.80
Net Advances by St. Paul	758,393.62	802,983.46	629,611.79
<b>Total Liabilities</b>	<b>813,408.39</b>	<b>1,185,640.43</b>	<b>1,271,344.47</b>

Page of  
Record.

12

HERBERT B. BUETOW, called on behalf of the Minnesota Mining and Manufacturing Company, testified as follows:

By Mr. Miller:

I live in St. Paul, Minnesota. I am assistant secretary-treasurer and comptroller of the Minnesota Mining and Manufacturing Company. I have been with them since 1926.

13 Since leaving school I have been employed as a cost accountant of the Waldorf Paper Products. In 1916 I was with the St. Paul Athletic Club, where I instituted and supervised a system of accounting. I was later associated with Bishop Brissman Company, St. Paul, public accountants, as a staff auditor. Later I was employed by the City of St. Paul to institute an accounting system in the Department of Public Works. Later I became a staff auditor for a firm of public accountants by the name of McGregor and Hines. Later I had charge of the accounting of the Elks Club. I was employed by the State of Minnesota in the Department of Agriculture to make audits of various creameries for the Department of Agriculture.

I resigned to become associated with the Minnesota Mining and Manufacturing Company, first, as an auditor and later, promoted to various positions. For a period of 20 years I have done tax work, mostly federal and some state work.

My duties at the present time, as an officer of the Minnesota Mining and Manufacturing Com-



Page of  
Record.

pany, place me in direct control over the entire accounting cost and statistical department and financial records and in direct supervision of the entire office force of about 225 people. All the books and records of the company are kept under my supervision.

- 14 I am a member of the Comptrollers Institute of America, and at the present time I am president of the Twin Cities Chapter. This institute permits membership of comptrollers of companies whose assets exceed a million dollars throughout the United States.

- I have compiled a statement of the number of stockholders and the number of outstanding shares of stock of the Minnesota Mining and Manufacturing Company, and the number of stockholders it has in Wisconsin, and the number of shares that they own. On January 1, 1936, the total was 1961 stockholders, owning 961,260 shares. There were 42 stockholders in Wisconsin, owning 3,006 shares. Since January 1, 1936, 347 stockholders, owning 138,747 shares of stock, have transferred their stock. Of this number 20 of said stockholders resided in Wisconsin and they owned 1,377 shares of stock. On January 1, 1938 there were 44 Wisconsin stockholders, owning 4,944 shares of stock.
- 15

The Minnesota Mining and Manufacturing Company operates a factory at Wausau, Wisconsin, manufacturing roofing granule. This factory ships its products to Chicago and points west. The sales from the Wausau plant are handled through a Mr. Voss, who has an office in Chicago.

Page of  
Record.

- He contacts various roofing companies and gets orders for roofing granules, sends the orders to St. Paul, and shipping instructions are sent from roofing companies to St. Paul where decision is made as to when the shipment shall be made. When shipments are made, the Wausau plant prepares a shipping ticket, upon which is shown the tonnage shipped. This ticket is sent to St. Paul where it is priced and the bill sent from St. Paul to the consumer. The consumer remits directly to St. Paul, and these funds are commingled with funds from other factories and other divisions of our business, and are deposited in St. Paul banks. These funds are used to pay all bills, royalties and dividends. The employees of the Minnesota Mining and Manufacturing Company are paid on time cards prepared at the Wausau plant and sent to St. Paul, where extensions are made and checks are drawn on a Wausau bank, signed by an officer at St. Paul, and sent to the Wausau plant manager for distribution. A deposit in equal amount to the total of the payroll is sent the same day to the Wausau bank. The Minnesota Mining and Manufacturing Company operates factories at Detroit, Michigan; Copley, Ohio; and St. Paul, Minnesota.
- 16
- 17 Testimony as to Baeder-Adamson loss (omitted).
- 18 The Minnesota Mining and Manufacturing Company, in 1935, received \$10,191.37 interest from federal securities and in 1936, \$14,331.65. These federal securities were actually kept in the

Page of  
Record.

19 vault in the bank in St. Paul, coupons were clipped at the bank in St. Paul and deposited in the St. Paul bank for collection. No part of the interest was ever received, paid or deposited in the State of Wisconsin.

20 The Minnesota Mining and Manufacturing Company, in 1935, received dividends of \$328,096.23 and interest from other than federal securities of \$27,125.17 and interest on state obligations of \$173.25.

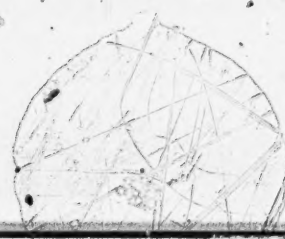
In 1936, the Minnesota Mining and Manufacturing Company received dividends of \$254,834 and interest from obligations other than United States obligations of \$7,797.53.

21 Mr. Best: I will stipulate that there is  
22 no contention on the part of the Income Tax Division and on the part of the State that any securities or any intangibles of this taxpayer have a situs in the State of Wisconsin. That, of course, is evident from the fact that no income from such intangibles has been included in Wisconsin income by the auditor.

Discussion (omitted).

By Mr. Miller:

23 The Minnesota Mining and Manufacturing Company, in 1935, received royalties from patents owned by it of \$154,447.53, of which \$224.20 were earnings in Wausau, Wisconsin, leaving a balance of \$154,223.33 earned by the taxpayer and received by the taxpayer outside the State of Wisconsin.



Page of  
Record.  
24

In 1936 the income from royalties on patents owned by the Minnesota Mining and Manufacturing Company was \$153,623.35, of which \$144.76 was royalties used in the colorquartz operations at Wausau, Wisconsin, leaving a balance of \$153,478.59 which was earned from royalties outside of the State of Wisconsin.

Mr. Best: Without prejudice as to our position, as to materiality, we stipulate that these intangibles from which the royalties were derived had no business situs in Wisconsin.

Mr. Best: If the Commission please, Exhibit 3, the audit report, shows in schedule 3 a summary of the amounts of dividends paid in the year 1936, the amounts are shown with respect to the dividends paid on April, July, and October 1st, 1936, and on December 22nd, 1936, include dividends paid on treasury stock to the amount of \$1,866.25.

Mr. Miller: Correct.

Mr. Best: That is the total for those four dividends. The dividends shown in schedule 3 of Exhibit 3 as being paid on January 2, 1936 do not include an amount of \$371.25 representing a dividend on treasury stock which was paid on that day.

25 Mr. Miller: That is correct. It is our contention we shouldn't be taxed on these treasury stock dividends.



By Mr. Miller:

When dividends are declared by the directors, a check is drawn on the First National Bank of St. Paul for the full amount of the dividend, including treasury stock, payable to the First Trust Company of St. Paul. It actually pays the dividends to the stockholders and returns to the Minnesota Mining and Manufacturing Company the dividend allotted to the number of shares held by the company. None of the money which is turned over to the transfer agent at the time the dividends are paid is drawn on any Wisconsin bank. The directors hold no meetings in the State of Wisconsin and no dividends are declared in the State of Wisconsin by the Minnesota Mining and Manufacturing Company.

The Minnesota Mining and Manufacturing Company commenced its Wausau plant operations in December, 1929. The first year they operated was 1930. They have operated ever since. I have prepared a statement of assets and liabilities for the years ending December 31, 1934, 1935 and 1936. It is Exhibit 7.

We do not maintain a separate set of books for our Wisconsin business. Exhibit 7 was prepared from our general ledger, depreciation book and inventories.

Mr. Miller: May we stipulate that the income of the taxpayer for the year 1930 in the State of Wisconsin was \$2,396.37?

Mr. Best: I will stipulate that is the correct 1930 income attributable to the activities in the State of Wisconsin.

Discussion.

Page of  
Record.

By Mr. Miller:

30 The total income of the Minnesota Mining and Manufacturing Company from all sources in the year 1930 was \$685,707.54. The Minnesota Mining and Manufacturing Company had no income attributable to Wisconsin prior to 1930.

Mr. Miller: May it be stipulated then that the net income of the Minnesota Mining Company for Wisconsin for the year 1931 was \$11,527.69, and the total income of the taxpayer from all sources for the same year was \$649,547.09? That in the year 1932 the taxpayer had no income in the State of Wisconsin but sustained a net loss of \$920.77 and during that same year 1932 the total income of the taxpayer was \$448,588.07. That in the year 1933 the Minnesota Mining Company had an income in the State of Wisconsin of \$10,212.78, and a total income from all sources of \$899,829.21. That in the year 1934 the taxpayer had no income in the State of Wisconsin, but a net loss of \$15,216.23, and in the same year 1934 the total income of the taxpayer from all sources was \$1,203,820.30. Is that correct, Mr. Best?

31

Mr. Best: How about taking the other year?

Mr. Connolly: That 1935 is in.

Mr. Best: 1935 is in but not 1936.

Mr. Connolly: 1936 hasn't entered the picture yet.

Mr. Best: You have offered to prove 1936 figures with respect to royalties and with respect to interest. Now if it is material, certainly the 1936 income is.

Mr. Connolly: That is all right, we have no objection.

Mr. Best: Why not add 1935 and 1936 to your stipulation.

Mr. Miller: That in 1935 the Minnesota Mining Company had a net income in Wisconsin of \$261,157.62 subject to an offset for the previous year's loss and a total income from all sources of \$1,764,460.30.

Mr. Best: The computation of which is shown in the stipulation.

Mr. Connolly: That \$663,000 is in dispute.

Mr. Best: Yes, the manner in which this \$764,460 item was arrived at from the book income is shown in the stipulation.

Mr. Connolly: No, not from the book income.

Mr. Best: Yes.

Mr. Connolly: That is the way it is arrived at but that isn't the book income.

Mr. Miller: Paragraph two shows the book income, we contend.

Mr. Best: Well, suppose we add at this point, then, in computing the total income you have just given for the year 1935, there was deducted an amount of \$663,656.66 which was the loss computed by the auditor

Page of  
Record.

to have been sustained in the Baeder Adamson Paper Mills, Incorporated, stock.

Mr. Miller: Yes, in that year.

Mr. Best: In that year.

Mr. Miller: While the taxpayer contends that the loss of 243 thousand sustained in that year—that the taxpayer, Minnesota Mining Company derived a net income from its Wisconsin operations in the year 1936 of \$183,521.31 and a total income from all sources of \$3,064,903.

Mr. Best: Those figures are agreed to as being correct with the two explanatory notes which are included in the stipulation.

Commissioner Mount: And without conceding the materiality.

Mr. Best: That is right.

Commissioner Mount: As to the years prior to 1935.

Mr. Best: And as to 1936.

By Mr. Miller:

The dividends paid by the Minnesota Mining and Manufacturing Company in 1931 were \$548,178.60; in 1932 were \$500,001.66; in 1933, were \$381,071.48; in 1934, \$566,671.61; in 1935, \$690,738.54. These figures do not include dividends on treasury stock.

34

On January 1, 1935, using the formula for determining the Wisconsin's share for dividends paid, all the income received by the Minnesota Mining and Manufacturing Company had been distributed prior to January 1, 1935.



Our computation shows that an excess of approximately \$6,000, without taking into account that share of dividends which should be allocated according to the formula in those two years, we sustained losses in Wisconsin, namely, 1932 and 1934.

35 In those two years the total dividends paid were \$1,071,812.62.

By Mr. Best:

In making the computation for the year's activities of the net income derived from Wisconsin's activities, I have taken the ratio of the net to the total net income of the company for the same year and have applied the percentage to the dividends paid in the succeeding year and by that means allocated dividends to Wisconsin earnings. The sum of these dividends was \$6,000 in excess of the total income from the Wisconsin operations, not taking into consideration this million dollar dividend. The losses in Wisconsin were about \$16,000, leaving a deficit from Wisconsin operations of \$10,000 without considering the dividends paid in the two loss years.

By Mr. Miller:

37 Testimony as to Baeder Adams loss (omitted).

The total book income of the Minnesota Mining and Manufacturing Company for the year 1935 was \$2,250,775.45. This included the ten thousand odd dollars received by the Minnesota Mining and Manufacturing Company from federal

securities. It included the interest and royalties received during the same year.

39. Mr. Connolly: There is only one other matter we have, and that is our protest in paragraph six should be amended to conform with the stipulation with reference to the B. A. loss and paragraph seven should be amended to conform with Exhibit 7 and paragraph 8 should be changed to conform with the offer of proof with reference to the 1936 intangible income from interest and dividends.

Mr. Best: No objection.

By Mr. Best:

40. The assets shown as cash, real estate, buildings, machinery, colorquartz machinery and inventory are taken from the general ledger. The inventory is taken from subsidiary record and these figures are included in the inventory account in the general ledger. We have one depreciation account in the general ledger and we have subsidiary record bearing out these figures. These records are actually taken from the subsidiary record and the Wisconsin earnings were taken from the Wisconsin returns and are the accrued state income tax determined by the audit report and the net advances are balancing figures. They do not appear on the books. There is no attempt to allocate Wisconsin stock to Wausau activities.

41. By Mr. Miller:

None of the interest on any of the bonds which was received by the Minnesota Mining and

Page of  
Record.

Manufacturing Company for the years 1935 and 1936 were secured by any mortgage or trust deed on any Wisconsin property and none of the dividends were received on any stock from any company operating or doing business in the State of Wisconsin in the years 1935 and 1936.

44-53

### DECISION OF TAX COMMISSION.

(Omitting title.)

44

This matter involves an assessment of privilege dividend taxes under the provisions of Section 3 of Section 71.60, Stats. 1937, with respect to dividends paid in 1936. The assessment is the result of a field audit by the Tax Commission's auditor.

The taxpayer offers evidence to the effect that the Minnesota Mining and Manufacturing Company, the appellant herein, is a corporation duly organized and existing by virtue of the laws of the state of Delaware, with its principal place of business in the city of St. Paul, state of Minnesota, and operating a factory for the manufacturing of colorquartz at Wausau, Wisconsin. The First Trust Company of St. Paul is the transfer agent for the taxpayer. All dividends were declared at a meeting of the board of directors in St. Paul, and all dividends paid by the taxpayer during the period affected by the tax in question were paid to the transfer agent in St. Paul by a check drawn on a St. Paul bank and by it distributed to the stockholders of the taxpayer. The

45

taxpayer had 961,260 shares of common stock distributed in practically every state in the Union; 3,006 shares of stock were owned by residents of the state of Wisconsin. There was no preferred stock outstanding.

The sales of the products of the taxpayer are largely made from the Chicago office of the taxpayer, and the proceeds of such sales are remitted by the purchaser directly to the St. Paul office of the taxpayer and deposited by the taxpayer in banks in St. Paul. All books and records covering the Wausau operations of the taxpayer are kept in St. Paul. All wages are paid directly from St. Paul. The receipts from the Wausau factory are commingled with the earnings from the taxpayer's factories at other places outside the state.

During the year 1930, the taxpayer acquired all of the outstanding capital stock of the Baeder Adamson Paper Mills, Inc., Philadelphia, Penn., for a consideration of \$1,267,306.66 for 10,000 shares. A year or two later, they sold 5,000 shares for \$633,650. During the year 1931, this concern discontinued operations, and, in 1935, the buildings were sold to a wrecking company for \$1,500 and the land was sold during the same year at a sheriff's sale to satisfy creditors.

46 In 1933 and 1934, after the Baeder-Adamson Paper Mills, Inc., discontinued operations, taxpayer set up on its books a reserve for loss on this stock in the amount of \$390,656.66. When the property was sold in 1935, the loss charged on the books of the taxpayer was the sum of \$243,000. The state's auditor, in determining this tax,



Page of  
Record.

charged off \$633,656.66 as a loss in 1935, thus reducing the taxpayer's total income from \$2,155,116.96 to \$1,764,460.30 and increasing the Wisconsin percentage of its total income from 12.1180 to 14.8010.

The auditor did not charge a tax on the dividend of \$371.25 on the taxpayer's treasury stock paid on January 2, 1936. The difference between the auditor's figures as to dividends paid and taxpayer's figures of dividends actually paid is accounted for by the fact that the auditor has imposed a tax on subsequent dividends of \$1,866.25 on the taxpayer's treasury stock.

On August 13, 1937, the Income Tax Division duly notified the taxpayer that it owed a privilege dividend tax of \$6,382.75, with interest amounting to \$501.01, computed to September 30, 1937; and on August 18, 1937, the taxpayer duly applied for hearing on said privilege dividend tax before the Wisconsin Tax Commission.

47 The taxpayer contends that its Wisconsin business is susceptible to separate accounting, and the taxpayer has filed its 1936 income tax return on a basis of separate accounting, which return has been approved by the Income Tax Division on that basis.

In 1935 and 1936, the taxpayer received income from intangible property, including royalties, dividends, and interest, some of the interest being on securities issued by the United States Government. None of the intangibles had a situs in Wisconsin, and the auditor for the Tax Commission did not include any part of the income

from intangible property. The income from intangibles was included by the auditor in total income in determining the ratio of Wisconsin income to such total income.

In 1936, Minnesota Mining and Manufacturing Company held shares of its own stock in its treasury. In the balance sheets this stock was shown among the liabilities as outstanding stock and among the assets as an investment. In paying dividends, the taxpayer issued one check to its transfer agent for the total amount of the dividend and the transfer agent then issued dividend checks to the stockholders. Dividends on treasury stock were included in the check drawn to the transfer agent and the taxpayer received from such agent a check for the dividends on treasury stock. The amounts thus received in 1936 totaled \$2,237.50, of which \$371.25 was paid on January 2, 1936, and the remainder of \$1,866.25 was paid subsequent to that date.

48 The auditor incorrectly applied a tax rate of 2.5641 per cent to the portion of the dividends which the auditor determined were paid out of Wisconsin income.

The first question to be determined by the Commission is whether or not the privilege dividend tax law is constitutional. The Commission has held in different cases that it has no power to pass upon the constitutionality of the privilege dividend tax law. Furthermore, the Commission is of the opinion that the constitutionality of the

privilege dividend tax law was passed upon *State ex rel. Froedtert G. & M. Co. vs. Tax Comm.*, 221 Wis. 225.

The next question is whether the privilege dividend tax may be imposed with respect to dividends paid on treasury stock. It is generally conceded that every person owning stock has the same right to share in dividends, in accordance with the rule laid down in *Hartley vs. Pioneer Iron Works*, 181 N. Y. 73; 73 N. E. 576. Eight states have deemed it necessary to provide by statute that no dividends be paid on treasury stock. The fact that these eight states have thought it necessary to enact such legislation is an argument in favor of the proposition that if there is no such statute, and Wisconsin has none, then treasury stock is entitled to participate in dividends. In the same case it is held that dividends may be declared on treasury shares, to be applied to the purchase price of the shares for the benefit of certain persons who have contracted to buy them. In the instant case, the corporation paid the dividends on its treasury stock, the money was turned over to the fiscal agent, and a dividend check was returned to the corporation. Under the facts as shown in this case, and the rule laid down in the *Hartley* case, and in accordance with Subsection (7) of the dividend tax law, which provides that dividends shall be defined as they are in Section 71.02 of the statutes, the Commission must hold that the treasury stock of this corporation was properly assessed.

Did the income tax auditor base the privilege dividend taxes as assessed solely upon income earned in Wisconsin? The taxpayer's brief states that the Wisconsin income was only \$245,941.39, while the auditor's report shows that the income out of the Wisconsin business amounted to \$248,927.48. But by reason of the concession relating to Baeder Adamson Paper Mills, Inc., stock, the dividends from Wisconsin income are reduced to approximately \$218,000. While this disposes of the taxpayer's argument, it should be noted that the 1935 Wisconsin income was \$261,157.62, and it must be accepted as the amount of Wisconsin income available for dividends. The figure used by the taxpayer is nowhere shown in the record but is computed by deducting the 1934 loss of \$15,216.23 from the 1935 admitted income. The fact that in a computation of normal income taxes the Legislature has allowed 1935 income to be offset by the 1934 net business loss is without effect in the computation of the earnings attributable to Wisconsin for privilege dividend tax purposes and has no effect upon the amount of 1935 income available for dividends.

Are the privilege dividend taxes, as determined by the auditor, based in part upon dividends on income from intangible property? The taxpayer contends that the tax has been imposed with respect to dividends paid out of royalties, dividends and interest received, including the interest on federal securities. This argument proceeds from the assumption that all of the income from intangible property received in 1935 was paid out in 1936 dividends. There is nothing in



Page of  
Record.

the record to support this argument. There is nothing to show that the proportion of intangible income paid out in dividends is any higher or any different than the proportion of other types of income thus distributed. The ratio of total dividends of \$1,682,200.05 to total income of \$2,007,460.30 is roughly 85 per cent. That proportion of the total income was paid out in dividends and there is no ground for the assertion that any higher percentage of income from intangible property was distributed to the stockholders.

51 The interest, dividends and royalties are included in total income but are not included in Wisconsin income. They are thus treated as income from sources outside of the state, and the method of computation used by the auditor does not impose a privilege dividend tax on their distribution. The result reached by this computation is the same result which would be reached if the ratio of total dividends to the total income were to be applied to the Wisconsin income, and this clearly demonstrates that no privilege dividend tax is imposed with respect to income from intangible property having a situs outside of the state. The taxpayer subtracts the interest, dividends and royalties from the total dividends paid and applies to the remainder a fraction which has as its denominator this total income, including that from intangibles. This method, obviously gives double effect to the intangible income.

The taxpayer's argument that that portion of the loss which was charged to the reserve should not be used to reduce 1935 income, since provision for this loss had to that extent been made

in prior years, and that such portion of the loss should be ignored in determining the 1935 income available for dividends, was well taken. The auditor was mistaken in using the tax rate of 2.5641 per cent in computing the privilege dividend taxes here involved. The rate which should have been used is 2.5 per cent, and the taxes should be recomputed to give effect to this change.

52

## FINDINGS.

*THE COMMISSION FINDS* That the privilege dividend tax in the instant case was properly assessed on treasury stock.

*IT FURTHER FINDS* That the income tax auditor assessed the privilege dividend taxes solely upon income earned in Wisconsin.

*IT FURTHER FINDS* That the ratio of total dividends of \$1,682,200.05 to total income of \$2,007,460.30 is roughly 85 per cent. That proportion of the total income was paid out in dividends and there is no ground for the assertion that any higher percentage of income from intangible property was distributed to the stockholders. The interest, dividends and royalties are included in total income but are not included in Wisconsin income, and the method of computation used by the auditor does not impose a privilege dividend tax on their distribution.

*IT FURTHER FINDS* That that portion of the loss which was charged to the reserve should

Page of  
Record.

not be used to reduce the 1935 income since provision for this loss had to that extent been made in prior years, and that such portion of the loss should be ignored in determining the 1935 income available for dividends.

*IT FURTHER FINDS* That the auditor was mistaken in using the tax rate of 2.5641 per cent in computing the privilege dividend taxes here involved. The rate which should have been used is 2.5 per cent.

53 *IT FURTHER FINDS* That it has no power to pass upon the constitutionality of the privilege dividend tax law.

### DECISIONS.

*IT IS, THEREFORE, ORDERED* That the assessment herein be recomputed in accordance with our findings.

*IT IS FURTHER ORDERED* That the assessment as recomputed be placed on the tax roll, and that proper notice be given to the parties to this appeal of this decision.

Dated at the State Capitol, Madison, Wisconsin, this 19th day of December, 1938.

### WISCONSIN TAX COMMISSION

W. J. Conway,  
Henry A. Gunderson,  
Herbert L. Mount,  
Commissioners.

Page of  
Record.

- 55 Return Receipt of Registered Mail Sending Tax Commission's Decision (omitted).
- 56 Letter of Transmittal of Tax Commission's Decision to Minnesota Mining and Manufacturing Company, Dated Jan. 1939 (omitted).
- 57-58 Recomputation of Tax Enclosed in Letter of January 4, 1939 (omitted). Copy attached to Taxpayer's Notice of Appeal to Circuit Court of Dane County. Record 122-123.
- 124-125 Admissions of Service of Notice of Appeal to Circuit Court of Dane County by Attorney General (omitted).
- 128 Admission of Service of Appellant's Brief by Attorney General on *February 16, 1939* (omitted).
- 129-206 Appellant's Brief on Appeal to Circuit Court of Dane County (omitted).
- 208-271 Respondent's Brief on Appeal to Circuit Court of Dane County (omitted).
- 273-274 Stipulation Consenting to Immediate Hearing on Appeal Before Court of Dane County (omitted).
- 275-276 MEMORANDUM DECISION AND ORDER CONFIRMING ASSESSMENT OF WISCONSIN TAX COMMISSION.
- (Omitting title.)
- 275 The above entitled matter comes before this Court upon appeal taken by Minnesota Mining



and Manufacturing Company, a foreign corporation, from decision and order of the Wisconsin Tax Commission dated December 19th, 1938.

Briefs were filed by John L. Connolly, Esq., of St. Paul, Minnesota, Frederick J. Miller, Esq. of Little Falls, Minnesota, and Ela, Christianson & Ela of Madison, Wisconsin, representing the Minnesota Mining and Manufacturing Company, appellant, and by the Attorney General of the State of Wisconsin and H. H. Persons, Esq., Assistant Attorney General, representing the respondent.

The court has considered the issues and matters raised on this appeal and which are covered in briefs filed by the respective parties, and particularly the constitutional question raised by the appellant; in view of the decision of the Supreme Court of the State of Wisconsin in the case of *State of Wis. ex rel., Froedert Grain & Malting Co., Inc. vs. Wisconsin Tax Commission*, 221 Wis. 225, and particularly in view of the decision rendered on the motion for rehearing in that case, this Court feels ~~that~~ it has no alternative except to hold the law under which the assessments were levied constitutional; and accordingly the said order of the Wisconsin Tax Commission affirming the assessment or assessments involved in this appeal should be confirmed. The other issues presented upon the appeal are also decided in favor of the Wisconsin Tax Commission.

Record.  
Page of  
276

**IT IS, THEREFORE, ORDERED,** that the assessment involved on this appeal by the Wisconsin Tax Commission against Minnesota Mining and Manufacturing Company, a foreign corporation, be and the same is hereby confirmed, and that judgment confirming said assessment be entered herein.

**AUGUST C. HOPPMANN,**  
Circuit Judge.

Dated, June 10, 1939.

278 Waiver of Notice of Application for Entry of Judgment (omitted).

280-281 **JUDGMENT.**

(Title omitted)

280 At the regular March 1939 term of the Circuit Court, begun and held in the Court House in the City of Madison in said county, and on the 10 day of June, 1939 of said term. Present the Hon. August C. Hoppmann, Circuit Judge presiding.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated December 19th, 1938, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the Minnesota Mining and Manufacturing Company, a foreign corporation, being dividends of January 2nd, 1936, April 1st, 1936, July 1st, 1936, October 1st, 1936 and December

Page of  
Record.

22nd, 1936; the matter coming on to be heard at said term under the provisions of the Wisconsin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by John L. Connolly, Esq. of St. Paul, Minnesota, Frederick J. Miller, Esq. of Little Falls, Minnesota, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys, and the respondent appearing by the Attorney General and Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant Minnesota Mining and Manufacturing Company, a foreign corporation,

Now, therefore, on the records, files and proceedings in the above entitled appeal, and on motion of the attorneys for the Wisconsin Tax Commission,

*IT IS ADJUDGED* that said order of the Wisconsin Tax Commission dated December 19th, 1938 and said assessment and tax be and the same are in all respects confirmed without costs to either party, except that the appellant Minnesota Mining and Manufacturing Company, a foreign corporation, shall pay the clerk's fee.

By the Court,

AUGUST C. HOPPMANN (Copy)  
Judge

NOTICE OF APPEAL TO SUPREME  
COURT

(Title omitted.)

*YOU WILL PLEASE TAKE NOTICE* that Minnesota Mining and Manufacturing Company, a foreign corporation, appellant in this proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this proceeding in the Circuit Court for Dane County, Wisconsin on the 10th day of June, 1939, in favor of the respondent and against the appellant, confirming an order of the Wisconsin Tax Commission dated December 19th, 1938 and an assessment and tax referred to therein, and from the whole of said judgment.

A copy of said judgment appealed from is hereto annexed.

Dated, June 12th, 1939.

JOHN L. CONNOLLY,  
FREDERICK J. MILLER,  
ELA, CHRISTIANSON & ELA,  
Attorneys for Appellant.

To: John E. Martin, Esq.  
Attorney General of State of Wisconsin.

Harold H. Persons, Esq.  
Asst. Attorney General of State of Wis.

Clerk of the Circuit Court for Dane County,  
Wisconsin.



Page of  
Record.

284-285 Copy of Judgment Attached to Notice of  
Appeal (omitted).

286 Undertaking on Appeal (omitted).

287 Power of Attorney to Agent to Execute  
Bond (omitted).

288 Admission of Service of Notice of Appeal  
by Attorney General and Clerk of Circuit Court  
June 13, 1939 (omitted).

289 Return of Clerk of Circuit Court of Dane  
County to Supreme Court of Wisconsin on Ap-  
peal (omitted).

Respectfully submitted,

JOHN L. CONNOLLY, Esq.,  
of St. Paul, Minnesota,

FREDERICK J. MILLER, Esq.,  
of Little Falls, Minnesota,

ELA, CHRISTIANSON & ELA,  
of Madison, Wisconsin.  
Attorneys for Appellant.

Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Eighth day of August, A. D. 1939.

Present: Hon. Marvin B. Rosenberry, Chief Justice; Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wiekhem, Hon. George B. Nelson, Hon. Joseph Martin, Justices.

Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the fifteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-nine came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Minnesota Mining & Manufacturing Company, a foreign corporation, by its attorneys and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Dane County, in said State, in words and figures following, that is to say:

Circuit Court, Dane County, Wis. Filed Jun. 13, 1939.  
Myrtle L. Hansen, Clerk.

STATE OF WISCONSIN,

In Circuit Court for Dane County:

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

#### NOTICE OF APPEAL

You Will Please Take Notice that Minnesota Mining and Manufacturing Company, a foreign corporation, appellant in this proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this proceeding in the Circuit Court for Dane County, Wisconsin on the 10th day of June, 1939, in favor of the respondent and against the appellant, confirming an order of the Wisconsin Tax Commission dated December

19th, 1938 and an assessment and tax referred to therein, and from the whole of said judgment.

A copy of said judgment appealed from is hereto annexed.

Dated, June 12th, 1939.

John L. Connolly, Frederick J. Miller, Ela, Christianson & Ela, Attorneys for Appellant.

To John E. Martin, Esq., Attorney General of State of Wisconsin.

Harold H. Persons, Esq., Asst. Attorney General of State of Wis.

\_\_\_\_\_, Clerk of the Circuit Court for Dane County, Wisconsin.

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Circuit Court, Dane County, Wis. Filed June 13, 1939. Myrtle L. Hansen, Clerk.

Filed Jan. 15, 1939. Arthur A. McLeod, Clerk of the Supreme Court, Madison, Wis.

STATE OF WISCONSIN,

In Circuit Court for Dane County:

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

#### JUDGMENT

At the regular March, 1939, term of the Circuit Court, begun and held in the Court House in the City of Madison in said county, and on the 10th day of June, 1939, of said term. Present the Hon. August C. Hoppmann, Circuit Judge, presiding.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated December 19th, 1939, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the Minnesota Mining and Manufac-

turing Company, a foreign corporation, being dividends of January 2nd, 1936, April 1st, 1936, July 1st, 1936, October 1st, 1936 and December 22nd, 1936; the matter coming on to be heard at said term under the provisions of the Wisconsin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by John L. Connolly, Esq., of St. Paul, Minnesota, Frederick J. Miller, Esq., of Little Falls, Minnesota, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys, and the respondent appearing by the Attorney General and Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10th day of June, 1939 filed its decision confirming said order and said assessment and tax and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant Minnesota Mining and Manufacturing Company, a foreign corporation,

Now, therefore, on the records, files and proceedings in the above entitled appeal, and on motion of the attorneys for the Wisconsin Tax Commission,

It Is Adjudged that said order of the Wisconsin Tax Commission dated December 19th, 1938, and said assessment and tax be and the same are in all respects confirmed without costs to either party, except that the appellant Minnesota Mining and Manufacturing Company, a foreign corporation, shall pay the Clerk's fee.

By the Court.

August C. Hoppmann, Judge.

Bond No. S—139815.

STATE OF WISCONSIN, IN CIRCUIT COURT FOR DANE COUNTY

Undertaking on Appeal

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Whereas, on the 10th day of June, 1939 in the Circuit Court for Dane County, Wisconsin, a judgment was entered



confirming the order of the Wisconsin Tax Commission dated December 19th, 1938 and the assessment and tax therein referred to, and the said Minnesota Mining and Manufacturing Company feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin.

Now, therefore, the undersigned Royal Indemnity Company of New York City, New York, a corporation duly licensed to do business in the State of Wisconsin, does hereby, pursuant to statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding Two Hundred Fifty (\$250.00) Dollars.

Dated at Madison, Wisconsin, this 12 day of June, A. D. 1939.

Royal Indemnity Company of New York. By Theodore Herfurth, Attorney-in-Fact. (Seal.)

In presence of: Mildred Subey, Katherine LaBarro.

Filed Jun. 15 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

#### Power of Attorney

(Endorsements) Original—State of Wisconsin. Circuit Court, Dane County. Minnesota Mining and Manufacturing Company, a foreign corporation, Appellant, vs. Wisconsin Tax Commission, Respondent. Service admitted this 13th day of June, 1939, Myrtle L. Hansen, Clerk. Circuit Court, Dane County, Wis. Filed Jun. 13, 1939, Myrtle L. Hansen, Clerk.

#### Notice of Appeal and Undertaking on Appeal

Ela, Christianson & Ela, 1 West Main Street, Madison, Wis., Attorneys for Appellant. Due service admitted this 13th day of June, A. D. 1939. John E. Martin, Atty. Genl. of Wis., by H. H. Persons, Asst. Atty. Genl., Attorneys for Respondent. Filed Jun. 15, 1939, Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

And afterwards, to-wit: on the 6th day of November, A. D. 1939, the following stipulation was filed in this cause:

State of Wisconsin, in Supreme Court

August Term, 1939. No. 98

MINNESOTA MINING AND MANUFACTURING COMPANY,  
Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

### Stipulation

It is hereby stipulated and agreed by and between the Appellant-Plaintiff, by its attorneys at law, and John E. Martin, Attorney General of the State of Wisconsin and Harold H. Persons, Assistant Attorney General of the State of Wisconsin, as attorneys for the Wisconsin Tax Commission, Respondent, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin, that the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin, may be made parties defendant and respondent in the above-entitled matter and that an order may be made and entered to that effect forthwith and without any further notice to any of the parties.

Dated October 30, 1939.

John L. Connolly, Frederick J. Miller, Ela, Christianson & Ela, Attorneys for Appellant-Plaintiff.  
John E. Martin, Attorney General of the State of Wisconsin; Harold H. Persons, Assistant Attorney General of the State of Wisconsin, Attorneys for Respondent, Wisconsin Tax Commission, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin.

Upon the foregoing stipulation,

It is hereby ordered: That the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin be and the same hereby are made defendants and respondents in the above-entitled matter.

Dated this 6 day of November, 1939.

By the Court.

Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin.

And afterwards to wit on the 7th day of November, A. D. 1939, the same being the 21st day of said term, the following proceedings were had in said cause in this Court:

Dane Circuit Court

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Frederick J. Miller, Esq., John L. Connolly, Esq., and G. Burgess Ela, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards, to wit: on the 16th day of January, A. D. 1940, the same being the 4th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

Dane Circuit Court

MINNESOTA MINING AND MANUFACTURING COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Opinion by Chief Justice Rosenberry

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment setting aside the assessment.

Justice Fowler dissents.

Thereupon the opinion of the Court by Chief Justice Rosenberry was filed in words and figures following, that is to say:

IN SUPREME COURT, STATE OF WISCONSIN, AUGUST TERM,  
1939

No. 98

MINNESOTA MINING & MANUFACTURING Co., a foreign  
corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

Appeal from a judgment of the circuit court for Dane county. August C. Hoppmann, Circuit Judge, presiding.  
Reversed.

This action was begun on January 25, 1939, by Minnesota Mining and Manufacturing Company, a foreign corporation, plaintiff, against the Wisconsin Tax Commission, defendant, to set aside an assessment of a tax imposed under the provisions of Sec. 3, ch. 505, Laws of 1935, as amended, sec. 70.61, Stats. From the judgment entered on June 10, 1939, confirming the assessment, the plaintiff appeals.

ROSENBERY, C. J.:

The principal question involved in this case is that considered and determined in the case of J. C. Penney Company vs. Wisconsin Tax Commission, decided herewith. For the reasons stated in that case the judgment in this case must be reversed.

By the Court.—The judgment appealed from is reversed and cause remanded with directions to enter judgment setting aside the assessment.

---

STATE OF WISCONSIN, IN SUPREME COURT

MINNESOTA MINING & MANUFACTURING Co., a foreign  
corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and



foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause in this Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 29th Day of March, A. D. 1940.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

---

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9757)

***BLANK PAGE***